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PENNSYLVANIA SUPREME COURT RULES THAT SCHOOL BOARD MEMBERS' SOCIAL MEDIA POSTS ARE NOT "RECORDS" UNDER THE RIGHT-TO-KNOW LAW

Penncrest School District v. Cagle, No. 31 WAP 2023, 2025 Pa. LEXIS 1258 (Trial Court should have considered additional factors, including whether social media accounts were public and whether accounts had "trappings" of an official agency account, before deciding whether school board members' posts were subject to disclosure.)

BACKGROUND

Penncrest School District ("Penncrest") created a display of books in its high school library, several of which addressed LGBTQ+ issues. A third-party contractor photographed the display and posted it to Facebook. Subsequently, a Penncrest Board Member, David Valesky, shared the post on his personal Facebook account and commented that: the display was "totally evil," it is "not what we need to be teaching kids," and students "aren't at school to be brainwashed into thinking homosexuality is okay." Another Penncrest Board Member, Luigi DeFrancesco, shared Valesky's post to his personal Facebook account without any additional commentary.

A Penncrest resident, Thomas Cagle, then submitted a request under the Right-to-Know Law ("RTKL") to Penncrest, seeking, in pertinent part, all "Facebook posts and comments" by Valesky and DeFrancesco "related to homosexuality and Penncrest."

Penncrest denied this request on the basis that no such posts or comments existed on any Penncrest-owned Facebook accounts. On appeal, the Office of Open Records ("OOR") found that, although the accounts were not District-owned, the accounts were used by the Board Members to discuss Penncrest business. Under these circumstances, the OOR ruled that the posts were public records subject to disclosure.

The trial court affirmed the OOR's determination and found that, since Valesky was expressing his views on a topic that was within the purview of the Board, the posts were public records subject to disclosure. However, the Commonwealth Court vacated and remanded the trial court's ruling, finding that it should have considered a host of other factors before reaching its decision. Specifically, the trial court should have examined the social media account itself, whether it was "private or public," and whether the account had the 'trappings' of an official agency account. The trial court also should have reviewed the content of the posts to discern "whether such posts prove, support, or evidence a transaction or activity of an agency."

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DISCUSSION

The Supreme Court began its analysis by setting forth that the RTKL's unambiguous language allows for the disclosure of all types of information, including postings on digital platforms, if they are found to document a transaction or activity 'of an agency,' and were created, received, or retained pursuant to law or in connection with a transaction, business, or activity of the agency. The Court agreed with the Commonwealth Court's finding that the trial court's analysis was insufficient and emphasized that the determination of whether a record is of an agency is a fact-specific inquiry.

The Court noted that little caselaw existed addressing the exact issue of whether public officials' social media posts are subject to disclosure under the RTKL. But the Court referred to prior Commonwealth Court cases that addressed email communications, acknowledging that an email is not a "record" simply because it is sent and received using an agency email address or by virtue of their location on an agency-owned computer. Instead, courts must examine the surrounding circumstances to determine whether such information is "of an agency." This is particularly important since school board members are often part of their local communities, and district issues are frequently interwoven with multiple facets of members' lives.

Cagle argued that the Commonwealth Court impermissibly created a "social media-specific test" which is contrary to the RTKL's language because the statute contains only a single definition for the term "record." The Supreme Court, however, disagreed: in the Court's view, Commonwealth Court's analysis was not novel and unfounded because many of the factors articulated in its opinion had been considered in various other RTKL cases involving other types of information.

PRACTICAL ADVICE

The *Penncrest* ruling is certainly a win for the privacy of public officials. However, public officials should still exercise caution with social media posts on personal

accounts. The Court did *not* hold that all posts on a public official's personal social media account cannot ever be disclosed under the RTKL. Instead, the Court emphasized that surrounding circumstances need to be examined to determine whether the posts are "records" for RTKL purposes. One factor the Court repeatedly referenced was whether the account has the 'trappings' of an official agency account. Thus, if a public official routinely uses their personal account for posting about agency business, such posts may be subject to disclosure. Additionally, the Court indicated that the public or private status of an account/post is relevant. If a public official is posting about agency business and the posts are available to the general public, it is more likely that such posts would constitute records under the RTKL. The result may be different, however, if such posts were communicated to a limited audience.



DISTRICT DILEMMA: COMPLY WITH DEPARTMENT OF EDUCATION'S DIRECTIVES (AND RISK LAWSUITS) OR BINDING COURT DECISIONS (AND RISK LOSING FEDERAL FUNDING)

*Fairfax Cty. Sch. Bd. v. McMahon, Civil Action No. 1:25-cv-1432, 2025 U.S. Dist. LEXIS 179299, at *5 (E.D. Va. Sep. 5, 2025). District Court for the Eastern District of Virginia declines to rule on the merits of a school district's challenge to the United States Department of Education's decision to freeze and condition federal funding on the district adopting policies that restrict bathrooms and locker rooms to students based on their biological sex and not in accordance with their gender identity.*

BACKGROUND

The Fairfax County School District adopted a gender-inclusive restroom and bathroom policy that contains the following provisions:

- “Gender-expansive and transgender students shall be provided with the option of using a locker room or restroom consistent with the student’s gender identity.”
- “In no case shall a gender-expansive or transgender student be required to use a locker room or restroom that conflicts with the student’s gender identity or be limited to using only a private area, single-occupancy accommodation, or other single-use facility as described in this section.”

On July 25, 2025, the Office for Civil Rights (“OCR”) of the Department of Education informed the district that its policy violated Title IX and is implementing regulations by treating cisgender students worse than transgender students. In addition, the OCR provided the district with a proposed Resolution Agreement which required the district to: 1) modify its policy to ensure that access to restroom and locker room facilities will be limited by students’ sex assigned at birth; and 2) ensure that all policies adopt OCR’s definition of the terms “sex, female, male, girls, women, boys, [and] men.” The district refused to sign the agreement because, in the district’s opinion, the terms of the agreement violate state and federal law.

On August 19, 2025, the Department designated the district as a ‘high-risk’ entity due to the district’s purported “noncompliance with Title IX.” As part of this designation, the Department placed all of the district’s grants on reimbursement payment status (i.e., the district, instead of receiving funds, would have to make payments and then seek reimbursement from the Department) and, as a condition of reimbursement, the district had to complete a corrective action plan confirming that it would comply with, among other things, the Department’s interpretation of Title IX.

On August 29, 2025, the district filed suit seeking, among other things, that the “high risk” designation be vacated, a declaration that the Department’s freezing and conditioning federal funds was illegal and a declaration that the district’s policy does not violate Title IX. Without reaching the merits of the decision, however, the District Court dismissed the case because it concluded that it lacked jurisdiction and directed the district to file its claims in a different court.

DISCUSSION

While the District Court declined to decide the merits of the lawsuit, the underlying issues are important because Pennsylvania school districts may be faced with the same difficult choices.

As noted above, the district in *Fairfax County* refused to modify its policies or agree to the terms of the Resolution Agreement because doing so would expose it to a risk of litigation for violating federal and state law. Specifically, in *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020), the United States Court of Appeals for the Fourth Circuit, which covers Virginia, considered the right of transgender students to access school facilities that correspond with their gender identity. In that case, a school district implemented a policy under which students could only use restrooms matching their “biological gender.” The policy also required that “students with gender identity issues shall be provided an alternative appropriate private facility.”

The Fourth Circuit concluded that this restrictive policy discriminated against a transgender student “on the basis of sex” under Title IX, reasoning that “[the student] was treated worse than students with whom he was similarly situated because he alone could not use the restroom corresponding with his gender.” Accordingly, the court found the student’s gender identity to be a protected status pursuant to Title IX and invalidated that district’s restroom restriction.

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Moreover, on August 15, 2025, the Fourth Circuit reaffirmed that “*Grimm* remains the law of this Circuit and is thus binding on all the district courts within it.” *Doe v. South Carolina*, No. 25-1787, 2025 WL 2375386, at *8 (4th Cir. Aug. 15, 2025). Accordingly, based on this binding precedent, the district believed that its policy complied with the applicable law.

Nevertheless, the Department took the position that the term “sex” means biological sex and has never meant “gender identity.” In making this determination, the Department relied on two Executive Orders issued by President Trump, which define sex as “an individual’s immutable biological classification as either male or female. See Executive Order 14168, *Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*, (Jan. 30, 2025); Executive Order 14201, *Keeping Men Out of Women’s Sports*, (Feb. 11, 2025). It also relied on court decisions in other jurisdictions that held that the term “sex” in Title IX refers to biological sex and not gender identity.

Accordingly, the Department concluded that because Title IX’s prohibition against sex discrimination does not include discrimination based on “gender identity,” the district’s policy violated Title IX and its implementing regulations.

As noted above, the District Court declined to hear the case on the merits, so the Department’s decision to freeze and condition federal funding remains in place.

PRACTICAL ADVICE

Pennsylvania school districts could find themselves facing a decision similar to that faced by the district in the *Fairfax County* case. As noted above, the Department of Education has made its position very clear: the term “sex,” as used in Title IX, is limited to biological sex, and sex discrimination does not include gender-identity discrimination. It has also shown a willingness to investigate and penalize school districts that fail to adopt this position.

On the other hand, the Court of Appeals for the Third Circuit, which covers Pennsylvania school districts, has, like the Fourth Circuit, rejected claims that a gender-inclusive bathroom and locker room policy like the one in *Fairfax County* violated Title IX. Moreover, in its opinion, the court noted that “barring transgender students from restrooms that align with their gender identity would itself pose a potential Title IX violation.” *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018).

Accordingly, given the conflicting obligations imposed on school districts by the Department of Education and the courts, school districts should work closely with their solicitors when deciding whether to adopt, rescind, modify, or keep their bathroom and restroom policies.



FEDERAL APPEALS COURT RULES DISCHARGE OF TEACHER BY PUBLIC UNIVERSITY FOR FAR-RIGHT VIEWS VIOLATES THE FIRST AMENDMENT

Jason Jorjani v. New Jersey Institute of Technology, et al., 151 F.4th 135, 2025 WL 2586673 (3d. Cir. 2025)(*The U.S. Court of Appeals for the Third Circuit, which includes Pennsylvania, overruled a district court decision that a teacher’s off-campus speech was not protected by the First Amendment because the University’s interest in “mitigating the disruption” of its operations “outweighs” the teacher’s constitutional interest in free expression.*)

BACKGROUND

Jason Jorjani, a lecturer at the New Jersey Institute of Technology (the “University”), was hired to teach

philosophy in 2015. His one-year contract was renewed in 2016 and 2017. During this period, Jorjani formed the “ALT-Right Corporation” and wrote essays arguing that “human racial equality” is a “left-wing myth” and Asians, Arabs, and Africans lack the “genetic basis” for high achievement. He also advocated “genetic engineering” and “embryo selection” to improve the genetic character of the population.

The University decided not to renew Jorjani’s contract following a *New York Times* article featuring a video of Jorjani’s remarks at a conference that “liberalism, democracy, and universal human rights” are “bankrupt...ideologies.” The piece also focused on Jorjani’s comments in a secretly recorded conversation in which he predicted that in 2050 bank notes would feature pictures of Adolf Hitler, who would be seen as a figure like Napoleon or Alexander the Great.

These revelations prompted statements from the President and Dean that Jorjani’s views were “antithetical” to the University’s “core values.” These were followed by statements from various departments and the Faculty Senate that Jorjani’s views produced “a discriminatory and intimidating education environment for [the] diverse student body” and a “hostile learning environment for students of color.”

DISCUSSION

In reversing the lower court’s dismissal of Jorjani’s First Amendment claim, the appellate court reiterated that a public employee’s speech is constitutionally protected as long as the employee speaks as a citizen and on a matter of public importance. The appellate court held that both requirements were met in this case. The court went on to hold that “the distractions” flowing from Jorjani’s speech did not “outweigh” his constitutional interest in expressing his opinions. The court emphasized that Jorjani’s speech took place outside of his academic environs and that the alleged “disruption” of the University’s operations amounted to disapproval, disagreement, and complaints. The court noted that the University never identified the

number of calls or complaints it received or the details of students’ concerns. According to the Court of Appeals, the University presented “no objective evidence” that students questioned Jorjani’s ability to teach, except for one witness who recalled a student dropping Jorjani’s class.

The appellate court concluded that disputes and disagreements over Jorjani’s beliefs were “not disruption” but “reasoned debate.” Similarly, it held that the University’s interest in a “non-denigrating” environment is unrelated to a teacher’s “competence and qualifications.”

The Court of Appeals’ ultimate conclusion was that Jorjani was terminated because he “offered views it disliked,” and that denying First Amendment protection to him would permit universities to discipline employees “anytime their speech might cause offense.”

PRACTICAL ADVICE

This decision marks a high-water mark for the protection of off-campus speech by public employees. It is noteworthy that the Court of Appeals did not even address whether a teacher’s outspoken belief that students who belong to certain racial or ethnic groups are genetically inferior is inherently “disruptive to the school’s operations.” Going forward, public institutions will have to make a specific and concrete showing of how an employee’s off-duty speech has harmed or obstructed the employee’s operation – a very high standard indeed. In this respect, the decision is reminiscent of the Supreme Court’s 2021 ruling in the *Mahonoy Area School District* case, which barred a public school from suspending a student from cheerleading for posting vulgar snapchat comments about the program.

During the controversy following the *New York Times* article about Jorjani, a law firm was retained to investigate whether Jorjani violated policy by not disclosing his outside activities and whether those

activities reflected a conflict of interest. Given the context of the public controversy over Jorjani’s comments and the timing of his discharge, it might be challenging for the University to convince a jury that these were the actual reasons for the discharge and that Jorjani would have been fired even if he had not made the controversial statements.

This decision and, in fact, the entire trend of rulings in the federal courts, should alert public employers, particularly public educational institutions, not to react precipitously to public criticism resulting from a teacher’s or other employee’s expression of unpopular political or social views. In most cases, the timing of a discharge following public controversy will make it very difficult for the employer to claim in court that the controversial speech was not the true reason for the disciplinary action. If an investigation reveals potential violation of other policies, the wisest course is to follow progressive discipline with respect to those violations so that, in the event of subsequent suspension or discharge, the school is somewhat insulated from a claim that the true motivation was retaliation for protected speech.



OOOR (OFFICE OF OPEN RECORDS) TAKES SURVEILLANCE FOOTAGE REQUEST AT “FACE VALUE,” DECLINES DISTRICT’S SEMANTIC INTERPRETATION

In re: Anna Waskevich v. Dallas School District, OOR Dkt. No. AP 2025-1643 (Pa. Office of Open Records, Sept. 9, 2025).

BACKGROUND

On May 19, 2025, parent Anna Waskevich submitted a Right-to-Know Law (“RTKL”) request to the Dallas School District in Northeastern Pennsylvania, seeking video footage of her child being “assaulted” in a middle school hallway. When the district did not respond within five business days, the request was deemed denied, and Ms. Waskevich appealed to the Office of Open Records (“OOR”). The OOR provided both sides with the opportunity to submit evidence.

The Dallas School District took the position that it was not in possession of any responsive records, despite having video footage from the date and location requested, because it did not feel the footage captured could be “characterized as an assault.” Dallas clarified that, “video does exist from the date, time, and location specified in the Request. However, that footage does not depict any assaultive or inappropriate conduct.” Dallas then advised that it would grant Ms. Waskevich access to the video, but only if she paid for the school to redact the faces of other identifiable students depicted.

On appeal, the Office of Open Records analyzed two separate issues: 1) Did Dallas meet its burden under the RTKL to show that no responsive record existed; and 2) Could Dallas withhold the record because it showed students’ faces?

DISCUSSION

Taking up the first issue, the OOR reaffirmed that agencies must make a “good faith effort” to determine if responsive records exist. The OOR held that the district’s assertion that it had no responsive records because the video did not depict an “assault” was an overly narrow interpretation of the request, which violated the purpose of the RTKL. The OOR reiterated that it interprets the RTKL liberally to affect its

purpose, and that by hanging up the request on the word “assault,” Dallas “thwarted” the purpose of the RTKL. Accordingly, because the district acknowledged video existed from the specified time and location, it failed to demonstrate that it was not in possession of a record responsive to Ms. Waskevich’s request.

Turning to the redaction issue, the OOR first noted that the video footage implicated the Family Educational Rights and Privacy Act (“FERPA”), which protects from disclosure “personally identifiable information” contained in “education records.” Because “personally identifiable information” is defined as “information that would allow a reasonable person in the school community...to identify the student with reasonable certainty,” the surveillance footage which showed students’ faces contained personally identifiable information. Accordingly, FERPA prevented disclosure of the recording to the extent that it would reveal the identity of students other than the requestor’s child. However, because Ms. Waskevich had a right, also arising under FERPA, to examine her own child’s “educational records,” she was entitled to view this video of her child. In sum, this meant that Dallas was mandated to provide the video to Ms. Waskevich with the faces of all students except her own child redacted. Because Dallas provided no evidence on appeal regarding its capability or the cost to redact students’ faces from the footage, it did not meet its burden to pass the cost off to the requestor. Dallas was required to perform the required redactions at its own expense and to permit Ms. Waskevich to view the resulting, redacted video.

Finally, the OOR noted that Dallas was prohibited from raising the RTKL’s non-criminal investigation exemption to disclosure on appeal, as the district had not asserted this basis in its response or other evidence submitted.

PRACTICAL ADVICE

Waskevich reinforces the following lessons for school districts fielding Right-to-Know requests:

1. While requestors must identify the records they seek with “sufficient specificity,” agencies should not be overly semantic in interpreting requests. If records exist which fall within a liberal interpretation of the request, the agency should not use subjective characterizations of terms within the request to withhold the record.
2. Video footage depicting students is an “educational record” to which parents of dependent students are entitled under FERPA.
3. However, FERPA also imposes the obligation upon districts to redact the faces of any students other than the requestor’s before producing video footage under the RTKL. A district may not pass the cost of redaction to the requestor without providing evidence as to the district’s inability to perform the redactions without the requestor bearing the cost.
4. School districts should be proactive in asserting any potential exemptions to public disclosure under the RTKL. An exemption, even one that may be applicable, will not be upheld by the OOR unless affirmatively raised by the district and supported by the evidence it submits.



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