TUCKER | ARENSBERG
Attorneys

EDUCATION LAW REPORT

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Tucker Arensberg PC

1500 One PPG Place
Pittsburgh, PA 15222
412.566.1212

300 Corporate Center Drive, Suite 200
Camp Hill, PA 17011

tuckerlaw.com

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TEACHER REINSTATED FOLLOWING TIKTOK POST FEATURING EXPLICIT SONG AND SUGGESTIVE DANCE MOVES

Cent. Valley Sch. Dist. v. Cent. Valley Educ. Ass'n, 2022 Pa. Commw. Unpub. LEXIS 482 (Pa. Commw. Ct., Nov. 7, 2022). In an unpublished opinion the Commonwealth Court of Pennsylvania upheld the decisions of an arbitrator and the trial court. The courts reinstated a teacher who participated in a TikTok video with her ninth-grade daughter, featuring a sexually explicit song and suggestive dancing. Crucial to the Court's analysis was that the District provided no evidence the video was widely disseminated and viewed by District students or the District community.

BACKGROUND

On or about October 20, 2019, R.H., a third grade teacher at Central Valley School District ("District"), recorded a 15-second video with her daughter, a minor ninth-grade student. The video featured a song containing explicit lyrics, including words referencing a sexual act. In the video R.H. lip-syncs the lyrics to the song and uses "suggestive hand and body motions."

The video contains nothing to identify R.H. as a teacher within the District, and was made during R.H.'s personal time, without using District-provided equipment. R.H. asked her daughter not to post the video to social media, but her daughter disregarded her mother's request and posted the video to the TikTok website. After learning the video was posted to TikTok, R.H. requested her daughter remove the video but R.H. did not take any affirmative steps to ensure the video was removed.

District administration suspended R.H. without pay on November 1, 2019 and charged her with immorality, incompetency, intemperance, and willful neglect of duties in violation of Section 1122(a) of the Pennsylvania Public School Code of 1949 ("School Code"). The District's Board of School Directors terminated R.H. at its next public meeting, effective December 9, 2019.

The Central Valley Education Association ("Association") filed a grievance on R.H.'s behalf, alleging R.H. had been terminated without just cause in violation of the collective bargaining agreement between the parties.

DISCUSSION

The matter proceeded to arbitration and the central issue was whether R.H.'s conduct was immoral under the School Code. To uphold its charge of immorality, the District was required to prove that R.H.'s actions offended the morals of the community. The District presented testimony of several school administrators stating that R.H.'s actions were immoral. In response, R.H. and her daughter both testified,

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as did several members of the community who stated the video was not offensive and did not impact R.H.'s standing as a positive role model for students.

The arbitrator reinstated R.H. to her teaching position and ordered she be provided all lost back pay, seniority and benefits. The arbitrator's decision was based on two findings. First, the arbitrator determined the District did not present evidence of the morals of the community, because the only District witnesses were District employees, rather than members of the community. Second, the arbitrator held the District presented no evidence the video was widely disseminated in the community and pointed out the video would have been not have been disseminated at all absent the actions of R.H.'s daughter.

On appeal the trial court and Commonwealth Court disagreed that school administrators were unable to testify regarding the morals of the community. However, the courts upheld the arbitrator's decision, agreeing the District did not prove the video offended the morals of the community because there was no evidence the video was widely distributed, and therefore no evidence the video actually offended community morals or set a bad example for District students. The Commonwealth Court explained:

> "[T]o establish a charge of immorality under Section 1122(a) of the School Code, a district must prove «(1) that the alleged immoral act actually occurred; (2) that the act offends the morals of the community; and (3) that the act sets a bad example for students." *Sch. Dist. of Phila. v. Jones,* 139 A.3d 358, 365 (Pa. Cmwlth. 2016) [quoting *McFerren v. Farrell Area Sch. Dist.*, 993 A.2d 344, 353-54 (Pa. Cmwlth. 2010)]. Like the trial court, we interpret the arbitrator's determination as a finding that the video, because of its very limited dissemination, did not, in fact, offend the community or set a bad example for students."

PRACTICAL ADVICE

To prove a charge of employee immorality, a school district must not only prove the employee committed an immoral act, but also that the employee set a bad example for students. In the context of a video posted to social media, this opinion apparently holds a school district must prove the video was widely disseminated and viewed among the student body, in order to show the employee actually offended community morals and set a bad example for students. However, laws regarding social media postings are evolving quickly and the above opinion was unpublished and therefore does not represent binding precedent on lower courts. Therefore, it is important school districts seek guidance from their solicitor when facing similar situations.

FEDERAL COURT GRANTS PRELIMINARY INJUNCTION FOR TITLE IX CLAIM, PRECLUDING SCHOOL DISTRICT FROM PREVENTING FEMALE STUDENTS FROM PARTICIPATING IN A DISTRICT ICE HOCKEY CLUB PROGRAM

*Brooks v. State Coll. Area Sch. Dist., No. 4:22-CV-01335, 2022 U.S. Dist. LEXIS 217173, at *2 (M.D. Pa. Dec. 1, 2022). The United States District Court for the Middle District of Pennsylvania granted the Plaintiffs' Motion for a Preliminary Injunction enjoining the Defendant School District from taking further action that would preclude Plaintiffs from participating in the District's ice hockey club program.*

BACKGROUND

The Plaintiffs, middle-school aged female students, previously played ice hockey for a private girls' ice hockey team at a local rink. When the local rink disbanded the hockey team in early 2022, the Plaintiffs tried out for State College Area School District's middle school co-ed hockey team. However, Plaintiffs did not make the team, as the final roster included nineteen players — all males, no females.

The District has an Ice Hockey Club ("IHC"), which is a parent-run booster club organized to help facilitate the District's ice hockey clubs at the various levels (middle school, junior varsity, varsity). Accordingly, after the Plaintiffs did not make the team, they gave notice to the District (via IHC) that they had assembled enough players, including the interested female students and other students who had not made the roster of the first team, coaches, and a designated separate ice time to roster a second team without any impact to the District. Alternatively, Plaintiffs asked the District to allow them to create a school-sponsored team independent of the IHC. However, both offers were rejected by the District.

After the Plaintiffs filed a grievance, the District's Title IX Coordinator conducted an investigation and authored a report wherein she determined that the school district was compliant with Title IX pursuant to the three-part effective accommodation test. Accordingly, the Plaintiffs filed a Complaint and a Motion for Preliminary Injunction with the United States District Court for the Middle District of Pennsylvania.

DISCUSSION

Title IX holds that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]" Furthermore, "[a] recipient which operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunities for members of both sexes."

Plaintiffs seeking injunctive relief under Title IX must demonstrate that the alleged discrimination is a failure of "effective accommodation" or "equal treatment" under the statute's subsequent regulations. Analysis of an "effective accommodation" claim includes a three-pronged effective accommodation test. Under the three-part effective accommodation test, an athletics program complies with Title IX if it satisfies any one of the following conditions:

1) Whether participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

2) Where the members of one sex have been and are underrepresented among athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

3) Where the members of one sex are underrepresented among athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

The Office for Civil Rights of the Department of Education ("OCR") clarified in 1996 that analysis of prong three asks whether, at the subject educational institution, there exists: 1) "unmet interest in a particular sport;" 2) sufficient ability to sustain a team in the sport;" and 3) "a reasonable expectation of competition for the team." If the answer to all three questions is "yes," OCR will find that an institution is not fully and effectively accommodating the interests and abilities of the underrepresented sex and therefore is not in compliance with [prong] three.

Because the parties only disputed whether the District was in compliance with the third prong of the three-part test,

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the Court focused its analysis there. First, the Court found that merely allowing female athletes to show up for co-ed tryouts is not enough to satisfy Title IX, as athletic opportunities means real opportunities, not illusory ones. Therefore, there were female students interested in ice hockey, and the District did not meet their interest. Next, the Court found that the District had sufficient ability to sustain an ice hockey team, as the Plaintiffs had enough total players to sustain a team and that the District did not demonstrate that it could not create a second co-ed middle school team that could accommodate the interested female students. Lastly, the Court determined that there is a reasonable expectation of competition for the team because neither party presented evidence indicating that a second co-ed middle school ice hockey team would be unable to compete in the already-existing club hockey league in which the current middle school ice hockey team competes. Accordingly, the Court determined that the District was in violation of Title IX, and Plaintiffs' Title IX claim was likely to succeed on the merits. The Court also went on to hold that Plaintiffs satisfied all requisite requirements, entitling them to a preliminary injunction

PRACTICAL ADVICE

Brooks v. State College Area School District demonstrates that merely allowing female athletes to show up for co-ed tryouts when the final roster includes no female athletes is not enough to satisfy Title IX. School Districts must show that the athletic opportunities available to female athletes are real opportunities, not illusory ones.

STATE SECRETARY OF EDUCATION ALLOWS DEDUCTION OF FEDERAL EXPENDITURES, PREKINDERGARTEN AND CERTAIN BLOCK GRANT EXPENDITURES FROM SCHOOL DISTRICT CHARTER SCHOOL TUITION RATES

School District of Philadelphia v. Antonia Pantoja Charter School, et al. Miscellaneous Docket Nos. before Secretary of Education — Secretary of Education upholds Philadelphia School District's Charter School tuition rates on budgeted total expenditures per average daily membership and that certain deductions of Federal expenditures from the charter school rates were permissible.

BACKGROUND

Under the Pennsylvania Public School Code, a school district is to pay a charter school for students lawfully enrolled in the charter school who are residents of the school district. If the school district, however, fails to pay a charter school, the charter school may request a redirection of subsidy from the school district. If the charter school asks for such redirection, a district may file an objection with the Department of Education and request a hearing on the subsidy redirection before the Secretary of Education. At such hearings, per the Charter School Law, the school district effectively has the burden to prove the redirection demand is inaccurate.

Several school districts had filed for redirection against the School District of Philadelphia ("SDP"). It was alleged SDP improperly deducted certain payments received and calculated "budgeted total expenditures per average daily membership," which essentially is the basis for payments to charter schools. Essentially, the issues for determination were 1) whether SDP's charter school tuition rates for the 2015 - 2016 and 2016 - 2017 school years were properly calculated based upon "budgeted total expenditures for average daily membership" and 2) whether the deduction of federal expenditures, pre-K program expenditures and a portion of the Ready to Learn Block Grant expenditures from the District's charter school tuition rates was proper.

DISCUSSION

In analyzing this issue, the Secretary of Education, in reviewing objections to rulings of a Pennsylvania Department of Education ("PDE") hearing examiner, reiterated that charter schools are subject to separate funding scheme from school districts, such centered around the Charter School Law ("CSL") particularly Section 1725-A of the School Code. Keep in mind that charter school funding is established by a formula which focuses on "budgeted total expenditures for average daily membership" of the prior school year.

Also in Pennsylvania, charter schools are local education agencies (LEAs) for purposes of federal funding. Under Pennsylvania's scheme, most federal grant programs distribute federal funds through the state agency (Pennsylvania Department of Education) to the LEA, which spends them. Accordingly, charter schools receive federal funding directly from PDE for state-administered programs. Also, charter schools are eligible to apply for and receive direct federal grants on the same basis as school districts in the state. But as to "budgeted total expenditures for average daily membership," the term "budgeted" is not defined by the CSL so as to dictate which particular budget may be adopted by a school district to calculate charter school tuition rates.

Because the SDP used an amended budget in its budget formulating process, as allowed by its Home Rule Charter, it utilized PDE Form 363. According to the Secretary, the CSL did not specify which formatted version of a budget a school district must use. The charter schools at the hearing focused on that the School District did not meet its burden to sustain an objection to redirection because it did not prove that PDE Form 2028 (which does not reflect a district's amended operating and capital budgets) was invalid. The Secretary disregarded this argument finding that as SDP used its budget to calculate its per pupil tuition rates, albeit through an authorized amended budget, this was a proper method to determine "budgeted total expenditures for average daily membership."

Charter schools also objected to the use of Form 363 form because it allowed for deductions of expenditures associated with federal funds, pre-K programs, and a portion of the Ready to Learn Block Grant in calculating charter school tuition rates. SDP argued that the deductions were proper and that the charter schools were essentially "double dipping" by not only being able to receive these funds from the federal government, but by demanding that these funds be included in the school district's calculation of its charter school tuition rates. Conversely, the charter schools contended that SDP did not have the authority to make these deductions and that only the state legislature could expressly allow such.

The Secretary rejected these arguments and found, as to federal funds, the Public School Code clearly stated that school districts were not required to include such funds in their budget. Fundamentally, charter schools are eligible and receive federal funds in the same manner as school districts. But including federal funds in SDP's calculation of charter school tuition rates would result in charter schools receiving more money than they would be otherwise entitled as they would be receiving federal funds directly from PDE and indirectly through the charter school tuition rate. Moreover, in indirectly receiving federal funds from SDP, the charter schools would benefit from the receipt of federal funds without having to comply with eligibility requirements and other terms and conditions to each grant. As to pre-K programs, the Secretary concluded that the CSL was silent as to pre-K expenditures. Further SDP consistently had made that deduction because charter schools are not allowed to have pre-K programs and do not qualify for pre-K Counts funds. In other words, requiring the charter school law to include pre-K programs would be absurd as to such schools are not authorized to operate such programs in the first place. As to Ready to Learn Block Grants, the Secretary found that the state's fiscal codes clearly prohibited school districts from including these grants in calculating charter school tuition rates.

The Secretary decision also addressed evidentiary issues dealing with the hearing officer's discussion of certain items. But on the main legal issues, the Secretary concluded that the School District appropriately used budgeted expenditures to calculate tuition rates and the additional deductions listed on PDE 363 were necessary to give effect to the charter school law and other laws.

PRACTICAL ADVICE

Charter school laws and funding are very complicated. However, it does appear that the Secretary in addressing redirection requests is not taking a rigid approach and in the spirit of fairness will determine whether "budgeted total expenditures for average daily membership" and deduction of charter school tuition rates is determined equitably.

CLOSING A SCHOOL BUILDING DOES NOT IMPLICATE DUE PROCESS OR FIDUCIARY RIGHTS

Save Our Saltsburg Schools v. River Valley School District, No. 1140 C.D. 2021 (Pa.Cmwlth. November 7, 2022) (Commonwealth Court rejects community group's efforts to invalidate school district's decision to close a school building).

BACKGROUND

Until 2021, the River Valley School District (previously known as the Blairsville-Saltsburg School District) had two middle-high schools, Saltsburg High and Blairsville High. The District's mission statement declares that the District "has an obligation to ensure that all [District] students will have equal access to a high-quality education[.]" In February 2020, the District's Board of School Directors voted to schedule a public hearing to discuss closing Saltsburg High in accordance with Section 780 of the Public School Code of 1949, 24 P.S. § 7-780.

The Section 780 hearing was held virtually, due to the COVID-19 pandemic, on January 13-14, 2021. The hearing included a presentation by the District's superintendent providing a rationale for closing Saltsburg High School and its consolidation into Blairsville High School and potential future use or disposition of the Saltsburg school. Saltsburg students, alumni, parents, business owners, and community members voiced opposition to the plan, including the projected impact of lengthier commutes to Blairsville High School on Saltsburg area students' educational and extracurricular experiences. Save Our Saltsburg Schools (SOSS) was a group representing Saltsburg area students, parents, community members, and business owners which provided the District with a report setting forth similar and additional concerns in opposition to the closing of Saltsburg High School.

On April 22, 2021, the Board Members voted to close Saltsburg High School and proceed with the consolidation at the end of the 2020-21 school year.

In June 2021, SOSS filed a complaint against the District in the Court of Common Pleas of Indiana County. The Complaint alleges that the Board Members never considered the alternative of keeping Saltsburg High School open and closing Blairsville High School (which is an older building); that before the Section 780 hearing, some Board Members made public statements about the proposed closure based on what SOSS characterizes as faulty information; that SOSS asked the Board Members to provide more information, but the Board Members declined to do so; that Board Members repeatedly indicated publicly before the hearing that the closure was moving forward; and that the Board Members "did not care" about the impact of the closure on Saltsburg High's students.

The Complaint contends that the Board Members improperly decided to close Saltsburg High before the Section 780 hearing and without public commentary or oppositional information. The Complaint adds that plans for a new athletic facility were not discussed or voted on publicly by the Board, but that those plans, rather than the best interests of students, formed the true motivation for closing Saltsburg High. As such, SOSS asserted that its

procedural due process rights under the Pennsylvania Constitution were violated and that the Board Members breached a fiduciary duty to SOSS and the Saltsburg community. The Complaint sought unspecified money damages and injunctive and/or declaratory relief.

The School District filed preliminary objections to the complaint, asserting that the complaint failed to establish a due process right to education at the school of one's choice, that no fiduciary duty existed between SOSS and the Board Members, and that the Board Members were immune from SOSS's suit under both the doctrine of high public official immunity and Pennsylvania's Political Subdivision Tort Claims Act (Tort Claims Act), 42 Pa.C.S. §§ 8541-8564. In September 2021, those preliminary objections were granted and the SOSS complaint was dismissed. An appeal followed to the Commonwealth Court which affirmed the lower court's dismissal of the SOSS action.

DISCUSSION

SOSS argued that the District and Board Members predetermined the closure of Saltsburg High School before the Section 780 hearing was held and acted for personal reasons and not in the best interests of the students and community; therefore, SOSS characterized the hearing as a "sham" and a violation of procedural due process rights of SOSS and the community.

Section 780 of the Public School Code states: "In the event of a permanent closing of a public school or substantially all of a school's facilities, the board of school directors shall hold a public hearing on the question not less than three (3) months prior to the decision of the board relating to the closing of the school." The Commonwealth Court concluded that this provision only establishes a procedural rule for the closing of a school building and does not create a constitutionally recognized liberty or property interest to keep certain school buildings open. Thus, the Commonwealth Court concluded that, because a Section 780 hearing is not adjudicative in nature, such a hearing does implicate procedural due process rights.

SOSS' complaint also contended that a fiduciary relationship existed because the Board Members were elected by District citizens to run the public schools, a role that entails significant power, including the authority to close schools. SOSS asserted that the Board Members breached their fiduciary duty and harmed the community and students by closing Saltsburg High for personal gain, specifically the desire for an enhanced football facility and program.

The Court rejected the contention that the Board of School Directors owed a fiduciary duty to the community when making an inherent managerial decision of whether to close a school. The Court further noted that the fiduciary relationship and duty SOSS posited conflicts with the clear legislative statements in the Public School Code empowering school boards to determine to close schools.

Consequently, the Commonwealth Court affirmed the dismissal of SOSS' complaint.

PRACTICAL ADVICE

The decisions of the Court of Common Pleas of Indiana County and the Commonwealth Court recognized and upheld the broad discretion vested in boards of school directors to determine to close school buildings. Typically, legal challenges to those decisions are premised upon allegations of an abuse of discretion which, in the context of school closings, courts rarely conclude exist. The SOSS complaint presented creative attempts to recharacterize a school closing decision as implicating procedural due process and fiduciary responsibilities, which efforts were categorically rebuffed by the courts given the statutory latitude afforded to school boards upon such matters.

TUCKER ARENSBERG Attorneys MUNICIPAL AND SCHOOL LAW GROUP

Matthew M. Hoffman Co-chair
412.594.3910
mhoffman@tuckerlaw.com

John T. Vogel Co-chair
412.594.5622
jvogel@tuckerlaw.com

Daniel C. Conlon
412.594.3951
dconlon@tuckerlaw.com

Irving S. Firman
412.594.5557
ifirman@tuckerlaw.com

Gary J.Gushard
412.594.5537
ggushard@tuckerlaw.com

Kevin L. Hall
717.221.7951
khall@tuckerlaw.com

Mark C. Hamilton
412.594.5558
mhamilton@tuckerlaw.com

Robert L. McTiernan
412.594.5528
rmctiernan@tuckerlaw.com

David J. Mongillo
412.594.5598
dmongillo@tuckerlaw.com

Weston P. Pesillo
412.594.5545
wpesillo@tuckerlaw.com

Thomas P. Peterson
412.594.3914
tpeterson@tuckerlaw.com

Ashley J. Puchalski
412.594.5509
apuchalski@tuckerlaw.com

Gavin A. Robb
412.594.5654
grobb@tuckerlaw.com

Kenneth G. Scholtz
412.594.3903
kscholtz@tuckerlaw.com

Richard B. Tucker, III
412.594.5562
rtucker@tuckerlaw.com

Christopher Voltz
412.594.5580
cvoltz@tuckerlaw.com

Ashley S. Wagner
412.594.5550
awagner@tuckerlaw.com

TUCKER ARENSBERG Attorneys
MUNICIPAL AND SCHOOL LAW GROUP

Tucker Arensberg, P.C. 1500 One PPG Place Pittsburgh, PA 15222 412.566.1212
tuckerlaw.com

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