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EDUCATION LAW REPORT

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In This Issue

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THE AUTHORITY TO PUNISH LEWD SPEECH IS LIMITED ONCE A STUDENT EXITS SCHOOL GROUNDS

Mahanoy Area Sch. Dist. v. B. L. by and through Levy, 141 S. Ct. 2038 (2021). The United States Supreme Court holds that while schools can sometimes regulate student speech that takes place off-campus, the school district violated this student's First Amendment rights when it suspended her from the junior varsity cheerleading squad for a vulgar social media post outside of school.

BACKGROUND

B.L., a high school cheerleader, posted a "Snap" featuring a photo of her and a friend holding up their middle fingers with the text, "f[***] school f[***] softball f[***] cheer f[***] everything" superimposed on the image. B.L. took the Snap at a local convenience store on the weekend when she was not participating in any school activity. The Snap did not specifically mention the high school or picture the high school. Further, the Snap was only shared with B.L.'s friends on SnapChat (a social media platform), and thus was not available to the general public.

Shortly after B.L. sent the Snap, one of the cheerleading squad's coaches informed B.L. that she was being dismissed from the squad. The coach produced a printout of the Snap and told B.L. that the Snap was "disrespectful" to the coaches, the school and the other cheerleaders.

The District Court granted an injunction ordering the District to reinstate B. L. to the cheerleading team. Relying on *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, the District Court found that B.L.'s punishment violated the First Amendment because her Snapchat posts had not caused substantial disruption at the district. The Third Circuit affirmed the judgment, but the majority reasoned that Tinker did not apply because the District had no authority to regulate student speech occurring off-campus.

On appeal, the Supreme Court held that while public school districts may have a special interest in regulating some off-campus student speech, the reasons offered by the District in this case were not sufficient to overcome B.L.'s interest in free expression.

DISCUSSION

The Supreme Court, in the seminal case of *Tinker*, held that students do not "shed their constitutional rights to freedom of speech or expression…at the school-house gate." However, the Court has also clarified that courts must apply the First Amendment protections to students "in light of the special characteristics of the school environment." One such characteristic is the fact that districts at times stand *in loco parentis*, *i.e.*, in the place of parents. The Court has previously outlined three specific categories of student speech that districts may regulate in certain circumstances:

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1) "indecent," "lewd," or "vulgar" speech uttered during a school assembly on school grounds;

2) speech, uttered during a class trip, that promotes "illegal drug use,"; and

3) speech that others may reasonably perceive as "bear[ing] the imprimatur of the school," such as that appearing in a school-sponsored newspaper.

In *Tinker*, the Court also said that districts have a special interest in regulating speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." 393 U.S., at 513, 89 S. Ct. 733. In *Levy*, the Court confirmed that these special characteristics call for leeway when districts regulate speech that occurs under its supervision.

As for off-campus speech, the Court held that the First Amendment permits public school districts to regulate **some** student speech that does not occur on school premises during the regular school day, but that this authority is more limited than the authority to regulate on-campus speech. This is because districts will rarely be standing *in loco parentis* when a student speaks outside of the school. In addition, if the district could regulate off-campus speech like on-campus speech, then a district would be able to regulate student speech 24 hours per day. Accordingly, the Supreme Court stated that a district bears a heavy burden to justify an attempt to regulate off-campus political or religious speech. Finally, because schools are the nurseries of democracy, districts should generally protect unpopular ideas, not regulate them. Accordingly, because of these differences, districts have much less leeway when attempting to regulate off-campus speech.

The Court declined to issue a bright line rule as to when districts could regulate off-campus speech, but concluded that the District did not have the right to regulate B.L.'s speech.

The Court noted that the speech was a crude criticism of B.L.'s team, coaches and school that was protected by the First Amendment. As for the District's interest in regulating the speech, it was minimal because the speech occurred outside of school hours and beyond school property that was transmitted through a personal cell phone to private social media friends.

As for the District's interest in prohibiting students from criticizing school teams and coaches in a vulgar manner, the Court concluded that districts have little interest in punishing student use of vulgar language outside of school.

The Court also dismissed the District's arguments that it was attempting to prevent disruption in the classroom or in the cheerleading squad because there was no evidence of any disruption in the record. Therefore, the Court concluded that the District did not meet the *Tinker* standard, which requires more than the desire to avoid the discomfort and unpleasantness that always accompanies an unpopular viewpoint.

Accordingly, while the Court did not agree with the Third Circuit's reasoning that districts cannot regulate off-campus speech, it affirmed the judgment and found that the District violated B.L.'s rights.

PRACTICAL ADVICE

While the Court indicated that discipline for off-campus speech may be permissible in cases of serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers, school districts should work closely with their solicitors when determining when speech can be punished and when it is protected by the First Amendment. As stated in Justice Alito's concurring option: "If today's decision teaches any lesson, it must be that the regulation of many types of off-premises student speech raises serious First Amendment concerns, and school officials should proceed cautiously before venturing into this territory."

COMMONWEALTH COURT APPROVES ASSESSMENT APPEALS BASED ON RECENT SALES AND COST BENEFIT ANALYSIS

GM Berkshire Hills v. Berks County Board of Assessment, 2021 WL 2835340 (Pa. Cmwlth. Ct. July 8, 2021). Commonwealth Court approves procedure for filing tax assessment appeals based on sales price, while also allowing taxing bodies to consider cost-benefit analyses in deciding on particular appeals.

In the continuing litigation between taxing bodies and taxpayers over how and when taxing bodies may file property tax assessment appeals, Commonwealth Court recently issued a decision clarifying when such appeals may occur, providing more latitude for taxing bodies on these issues. Under Commonwealth Court's holding in *GM Berkshire Hills v. Berks County Board of Assessment*, 2021 W.L. 2835340 (Pa. Cmwlth. Ct. July 8, 2021), sales prices can be used as a basis for appeals. Further, taxing bodies may consider the costs versus benefits of filing an appeal in determining to proceed.

BACKGROUND

In November 2017, interrelated owners purchased multiple properties located in the Wilson School District, Berks County, comprised of almost 50 residential buildings, encompassing hundreds of rental units, for about $55 million. At the time of purchase, Berks County recorded an assessed value for the properties at a combined $10,448,700. The following June, the School District passed a resolution authorizing its business office to initiate assessment appeals within the District, and the business office used state-generated monthly sales reports to select properties for appeal. The resolution further instructed the business office to begin with recently- sold properties and apply the County's applicable common level ratio ("CLR") of 68.5% to each sale. (The CLR very roughly is a state-published ratio showing the assessed value of properties sold over the sales price of such properties.) The District then would pursue an appeal on a property if the difference between the sales price (adjusted by the CLR) and the assessment was $150,000. This $150,000 figure represented a threshold where the revenue from an appeal would justify the legal and appraisal fees necessary for the appeal.

Using the method outlined in the resolution, the District calculated that the GM Berkshire properties' combined sales price, when multiplied by the applicable CLR, resulted in a combined assessment of over $37 million. This obviously exceeded the prior combined assessed value of $10,448,700. Accordingly, the District appealed the properties' assessment for the 2018 and 2019 tax years to the Berks County Board of Assessment. That Board conducted a hearing and by decision increased the assessed value of the properties to over $37 million, reflecting 68.5% of the November 2017 combined sales price as adjusted by the CLR.

The taxpayer appealed the decision to the Court of Common Pleas of Berks County. The Court, while recognizing the constitutional arguments raised by the taxpayer, found acceptable the School District's method of filing appeals on recently-sold properties where the assessment differential after applying the CLR was at least $150,000. Accordingly, the taxpayers further appealed to the Commonwealth Court.

DISCUSSION

Upon appeal, the taxpayer argued that the District's method of using recently sold properties for determining assessments violated the U.S. Constitution's equal protection clause and the state constitution's uniformity clause. Foremost, the taxpayer asserted that the District could not selectively seek reassessment of properties based on recent sales while declining to appeal the assessments of unsold properties that may be similarly under-assessed. The taxpayer also challenged the District's use of the $150,000 threshold. The taxpayer, while acknowledging this practice may be neutral on its face, it still violated the state uniformity clause by resulting in disparate treatment of otherwise similarly situated properties, even if based on a valid cost-benefit analysis.

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In reviewing the case, the Court first analyzed the state's Consolidated County Assessment Law, 53 Pa. C.S. §§ 8801-8868, which allows school districts to file assessment appeals in the same manner that taxpayers are allowed. The Court noted the Law does not restrict the methodology school districts may use to determine whether to appeal. But any methodology had to comply with the uniformity clause, which not only prohibits wrongful conduct in taxation, but precludes disparate treatment of properties.

The Court then analyzed recent assessment cases including *Valley Forge Towers N L.P. v. Upper Merion Area School District*, 163 A.3d 962 (Pa. 2017), where the State Supreme Court disallowed differentiation of appeals made based on the property type (e.g., residential versus commercial). However, Commonwealth Court noted that the *Valley Forge Towers* Court stressed it did not expressly disapprove of selection of properties for assessment appeals based on recent sales prices, and that the use of a monetary threshold did not violate constitutional principles. The Court also referenced recent decisions where a school district's use of sales prices and a cost-benefit formula to determine appeals was proper as long as property types or classifications are ignored.

Here, though, the argument of GM Berkshire was that the taxpayer was arguing that the district's use of recent sales itself amounts to an improper classification (as opposed to other cases that were based on property types). But the Court held that using recent sales prices as part of a selection of properties for appeals is a quantitative method of reasonably ascertaining a property owner's fair share of the tax burden. Accordingly, as such method employs a purely economic approach that is practical yet does not improperly differentiate based on property type, the Commonwealth Court agreed with the trial court that the School District's methodology did not violate either the equal protection clause of the U.S. Constitution or the uniformity clause of the State Constitution.

PRACTICAL ADVICE

The *GM Berkshires* Court acknowledged that other assessment cases before the Pennsylvania Supreme Court might modify the limits on assessment appeals generally. However, absent any change the Supreme Court may mandate, it is clear that taxing body appeals based on sales prices, while applying cost-benefit thresholds, is acceptable.

SUNSHINE LAW AMENDMENTS TO REQUIRE PRIOR PUBLIC NOTICE OF OFFICIAL ACTIONS AT BOARD MEETINGS

On June 30, 2021, Governor Tom Wolf signed into law Act 65 of 2021, amending the Pennsylvania Sunshine Act to establish new public notice requirements applicable to meetings of school districts' boards of school directors. The amendments become effective August 29, 2021.

POSTING OF AGENDAS

In addition to any public notice requirements under the Sunshine Act, the amended statute will require the following:

1) The meeting agenda must be posted to the school district's website not less than 24 hours before the meeting is convened. The agenda must include a listing of each matter of agency business that will be or may be the subject of deliberation or official action at the meeting.

2) Copies of the agenda, including a listing of each matter of agency business that will be or may be the subject of deliberation or official action at the meeting, must be made available to persons attending the meeting.

3) The agenda must be posted at the location of the meeting and at the principal administrative office of the school district. (Interestingly, the amendments do not specify that such posting be made in advance of the meeting. However, posting such information at least 24 hours in advance of the meeting would constitute good faith compliance with this requirement).

These notice requirements apply to **any** meeting where deliberation is expected to occur — even if there is no vote being taken. Consequently, such public notice is required for planning meetings and committee meetings. Notably, however, the requirements to do not apply to executive sessions or conferences that are not required to be open meetings under the Sunshine Act.

CHANGES TO AN AGENDA

The new law also prohibits a school board from taking official action on a matter of business at a meeting if that matter was not included in the required public notification, except under certain circumstances:

- If the subject matter of the official action involves an emergency involving a clear and present danger to life or property;

- If the official action involves a subject that is *de minimis* in nature and does not involve the expenditure of funds or entering into a contract or agreement; and

- If, during the conduct of the meeting, a resident or taxpayer brings a matter of agency business that is not listed on the agenda, the school board may take action to refer the matter to staff for further research and potential inclusion on an agenda of a future meeting.

A matter may be added to the agenda during the conduct of a meeting upon a majority vote of the school directors present and voting at the meeting, and the reason for the added item is announced before the vote. For matters added to an agenda by a majority vote, the board may then take official action on the matter provided that it posts the amended agenda on its website and at its principle administrative office no later than the first business day following the meeting at which the agenda was changed. Also, the official minutes of the meeting must reflect the substance of the matter added, the vote on the addition and the announced reasons for the addition.

PRACTICAL ADVICE

These new requirements and limitations create an additional burden on administrators to thoroughly plan board meeting agendas to ensure that necessary subjects of potential action are included. Additionally, school districts should review and revise their meeting policies to ensure alignment with this legislation.

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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.