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"CIVILITY" POLICY FOR PUBLIC PARTICIPATION AT SCHOOL BOARD MEETINGS FOUND UNCONSTITUTIONALLY VAGUE

Marshall v. Amuso, No. 21-CV-4336 (E.D.Pa. November 17, 2021). (Federal court concludes that school board policy governing public participation at school board meetings was unconstitutionally vague and an infringement on free speech rights).

BACKGROUND

As provided by the Sunshine Act, the Board of School Directors of the Pennsbury School District allows public comment at its meetings. The District's Policy No. 903, governing public participation at school board meetings, requires that speakers preface their comments by an announcement of their name, address and group affiliation if applicable. Additionally, the policy provides that the Board's presiding officer may interrupt or terminate public comments deemed "too lengthy, personally directed, abusive, obscene or irrelevant."

In March 2021, Douglas Marshall gave a public comment without interruption. After the meeting, video from that board meeting was posted on the district's website. Later, the District removed the video from its website to remove the comments deemed after-the-fact to be in violation of the public participation policy. The School Board President then issued a public statement explaining that the comments were removed because they "were abusive and irrelevant to the work taking place in the Pennsbury School District" and that "[t]he comments escalated from expressing a viewpoint to expressing beliefs and ideas that were abusive and coded in racist terms, also known as 'dog whistles.'" She also apologized to the community for not interrupting Mr. Marshall as he was making his comments.

At the May 2021 board meeting, three other plaintiffs spoke. The meeting agenda included a presentation on the District's equity program. First, Mr. Daly began by defending what the Board's representative deemed to be Mr. Marshall's "abusive" March 2021 comments. The assistant solicitor demanded that Mr. Daly terminate his comments because he considered them to also be abusive and irrelevant and thus

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in violation of Policy 903. He also interrupted Mr. Marshall's comments because Mr. Marshall referred to the equity policy using a different programmatic title rather than the Board's formal chosen title for that program/policy, and then terminated Mr. Marshall's comments as abusive and irrelevant. Mr. Abrams endeavored to discuss survey results for the equity policy and voiced his opposition to funding a program for the portion of respondents who reported they were unhappy, and the assistant solicitor terminated Mr. Abrams's comments as "irrelevant to diversity in education." In each instance, the assistant solicitor shouted over the speakers during their allotted time segments, yelling "you're done!" repeatedly until the speaker left the microphone.

At the June 2021 meeting, one of the plaintiffs criticized Policy 903 and the school board's implementation of it. He finished his remarks, but the solicitor interrupted a portion of the allotted speaking time to state that personal insults or personally directed comments would lead to his comments being terminated.

Ultimately, the plaintiffs filed litigation in the United States District Court for the Eastern District of Pennsylvania seeking to enjoin the District from enforcing Policy 903's prohibitions of speech deemed "personally directed," "abusive," "irrelevant," "offensive," "otherwise inappropriate" or "personal attacks" and its requirement that speakers publicly announce their address before speaking. Following an evidentiary hearing, the court found Policy 903 to be unconstitutionally vague and as interfering with free speech rights and enjoined the District from further enforcement of its policy.

DISCUSSION

The First Amendment protections for free speech apply to speaking at public school board meetings. A school board meeting is a limited public forum in which content-based restrictions are valid as long as they are reasonable and viewpoint neutral. Thus, the court's analysis focused upon whether, as written, the policy limitations on public comment were capable of objective application and whether, as applied, those limitations involved viewpoint discrimination.

The First Amendment protects offensive speakers, insofar as "giving offense is a viewpoint." The court noted that the policy terms invoked by the school district to terminate the plaintiffs' comments at meetings – "abusive" and "personally directed" – prohibit speech purely because it disparages or offends. Similarly, the court found that the term "disruptive" reaches constitutionally protected speech, observing that disruptive ideas, rather than disruptive conduct, also involves the expression of a particular viewpoint.

The court also found the limitations on public comments to be unconstitutionally vague and overbroad. While acknowledging that some degree of discretion in how to apply a given policy is necessary, the policy must provide objective, workable standards as to what constitutes a policy violation. What may be considered "irrelevant," "abusive," "offensive," "intolerant" or "inappropriate" can vary from speaker to speaker and listener to listener. The court concluded that the vagueness of the limitations on public

comment established by the policy has a chilling effect on free speech, since speakers have no clear guidance as to what speech is or is not permissible. The court took issue with the prohibition of "personally directed" speech as demonstrative of the overbreadth of the policy, noting that, while the school board could prohibit attacks not related to District business, criticism of individual employees is relevant to the purpose of the limited public forum of a school board meeting.

Lastly, the court ruled that the policy requirement that speakers preface their comments with announcement of their specific home address to be an unreasonable restriction because of the potentially chilling effect on speech, particularly when speaking on hotly-contested issues. The court counseled that, to ensure that the speaker is a resident, the school district can collect his or her address with written forms in lieu of a public announcement.

PRACTICAL ADVICE

The limitations on public comments in Pennsbury School District's Policy No. 903 at issue in this case – "abusive," "irrelevant" and "personally directed" – are common to the public participation policies adopted by many school districts across the Commonwealth. In consideration of the court's analysis and findings in the Marshall case, school districts promptly should review their public participation policies to clarify vague terms or to eliminate those that could be considered as allowing viewpoint discrimination.

Likewise, because most school districts limit public participation at school board meetings to residents as taxpayers as permitted by the Sunshine Act, it is common practice for moderators to request public speakers to publicly announce their address. Instead, school districts should utilize procedures by which speakers provide their address of residence on request forms or sign-in sheets in advance of the public comment period.

PENNSYLVANIA SUPREME COURT HOLDS THAT COMMUNICATIONS BETWEEN AGENCIES AND THEIR CONSULTANTS ARE NOT EXEMPT FROM PUBLIC DISCLOSURE UNDER THE RIGHT-TO-KNOW LAW

Chester Water Authority v. Pennsylvania Dept. of Community and Economic Development, 249 A.3d 1106, 1108 (Pa. 2021), reargument denied (June 17, 2021). Pennsylvania Supreme Court holds that communications between an agency and its private contractors are not internal to the agency and, therefore, cannot be exempt from disclosure under the internal, predecisional deliberation

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exception set forth in Section 708(b)(10) of the Right-to-Know Law ("RTKL"). However, the Court declined to decide whether documents generated by these third parties and used by agencies in their internal, predecisional deliberations are protected from disclosure.

BACKGROUND

In *Chester*, the Requester, the Authority, sought documents reflecting communications among the Department of Community and Economic Development ("DCED") and its consultant and the consultant's subcontractors related to the potential sale of the Authority.

The Office of Open Records ("OOR") concluded that records that DCED had exchanged with the consultants were internal to the agency, for purposes of the Section 708(b)(10)(i)(A) exception, due to the contractual relationships among the parties. The Commonwealth Court affirmed, stating:

> [A]s it pertains particularly to the internal, predecisional deliberation exception, [the statutory deliberative process] exception "benefits the public and not the officials who assert the privilege" by recognizing "that if governmental agencies were forced to operate in a fishbowl, the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer."

Finnerty v. DCED, 208 A.3d 178, 187 (Pa. Cmwlth. 2019).

On appeal, the Pennsylvania Supreme Court reversed because the consultants were not "agencies" and the communications between DCED and the consultants were not "internal" to DCED.

DISCUSSION

Section 708(b)(10) of the RTKL exempts from the general requirement for disclosure records that reflect:

> The internal, predecisional deliberations of an agency, its members, employees or officials or predecisional deliberations between agency members, employees or officials and members, employees or officials of another agency, including predecisional deliberations relating to a budget recommendation, … or course of action or any research, memos or other documents used in the predecisional deliberations.

65 P.S. § 67.708(b)(10)(i)(A).

In *Chester*, the Pennsylvania Supreme Court determined that the text of Section 708(b)(10)(i)(A) prohibits disclosure of "*internal*, predecisional deliberations of an agency, its members, employees or officials," as well as deliberations between such individuals and another agency and that the consultants were not agencies under the RTKL. Accordingly, the Court concluded that because private consultants providing services as independent contractors do not qualify as "agencies, members, employees, or officials" who may engage in protected internal communications, Section 708(b)(10)(i)(A) does not serve to insulate communications exchanged

between a Commonwealth agency and a private consultant from a RTKL request.

The Court recognized and considered the aim to promote the free exchange of deliberative communications against the RTKL's overarching policy of openness but concluded that the Legislature already conducted the necessary balancing and knowingly chose to exclude communications with consultants and contractors from the protections of Section 708(b)(10)(i)(A).

As noted by the dissent, however, Section 708(b)(10)(i)(A) includes predecisional deliberations relating to, *inter alia*, a "contemplated or proposed policy or course of action or any research, memos or other documents used in the predecisional deliberations[,]" and this language indicates that "any" documents used in predecisional deliberations are protected from disclosure by the exception, without reference to their particular source. 65 P.S. § 67.708(b)(10)(i)(A). The majority opinion refused to address this issue, stating: "we leave it for another day…whether (or to what degree) the research-memos-documents rubric…might serve as an exception to the statute's specified focus on matters internal to the agency."

Accordingly, while communications between a school district and a private consultant are not exempt from disclosure under this exemption, documents they generate that are used by the school district for internal, predecisional deliberations may be protected from disclosure.

PRACTICAL ADVICE

Prior to the Supreme Court's decision in *Chester*, the Commonwealth Court and Office of Open Records had consistently found that communications with contractors were protected by this exception. See, id., n. 7 (stating: "The OOR's approach in treating deliberations between agencies and consultants as internal to the agencies, apparently traces to *Spatz v. City of Reading*, No. 2010-0655, slip op., 2010 WL 3925139 (OOR Sep. 7, 2010)."). At first glance, *Chester* appears to indicate a major shift in the law that may require school districts to make documents generated by third-party contractors, including those addressing topics of internal, predecisional deliberations, publicly available.

However, school districts will need to look for future cases to see how courts interpret the "research-memos-documents rubric" to see if such documents remain exempt. If such documents remain exempt and *Chester* is limited to "communications," then *Chester* will not have as big of an impact on a school district's interactions with its contractors. To date, there have not been any court decisions, but the Office of Open Records, in *Shannon v. Pennsylvania Department of Education*, AP 2021-1351, 2021 WL 4502699, determined that while communications between the agency and an outside consultant were public records, a report generated by an outside consultant and used by the agency to evaluate a charter school's renewal application was exempt from disclosure under Section 708(b)(10)(i).

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Accordingly, upon receipt of a request for such records, school districts should work closely with their solicitor to determine what must be released.

BAN OF DISRUPTIVE PARENT FROM SCHOOL EVENTS NOT AN UNCONSTITUTIONAL SPEECH INFRINGEMENT

*McNett v. Jefferson-Morgan Sch. Dist., 2:21-CV-01064-RJC, 2021 WL 5505849, at *1 (W.D. Pa. Nov. 23, 2021) (A parent's challenge to being banned from school events for disruptive behavior found not to have violated his constitutional rights).*

BACKGROUND

This case arose from Jefferson-Morgan School District's decision to indefinitely ban a parent from entering school property and attending school-sponsored events due to a pattern of inappropriate behavior at school sporting events.

Virgil McNett's son was a member of the high school football team. In 2018 McNett threatened to "kick [the head coach, Aaron Giorgi's] a--!" after his son was removed from a football game. Subsequently, the parent attended a meeting with the school district's Athletic Director and Superintendent to discuss his past behavior and the conduct that is expected of individuals attending school-sponsored events. At a football game following that meeting, McNett became upset after a play and directed profanity toward the Superintendent who also was in attendance. McNett also was removed from an away football game during the 2019 football season because of his inappropriate behavior as a spectator. Finally, in September 2020, McNett went to pick up his son after an away football game. While McNett's son and his teammates were exiting school buses, McNett paced around the buses in an intimidating manner looking for the head football coach. As the students and coaching staff exited the buses, McNett yelled at the coach and called for his resignation.

Because of McNett's behavior, characterized as "[b]ullying, intimidation, physical or verbal aggression, and the repeated use of profanity," the Superintendent notified McNett that he was prohibited from being on school property or attending school-sponsored events. It also indicated that the ban would be reviewed during the 2021-2022 school year. However, McNett was informed via e-mail in August 2021 that his request for the ban to be lifted was denied. Despite the ban remaining in place, the parties were able to reach agreements for McNett to attend certain school-sponsored events upon request.

McNett subsequently filed a complaint against the school district asserting defamation and claims under 42 U.S.C. § 1983 for purported violations of

his First and Fourteenth Amendment rights under the United States Constitution, and requesting injunctive relief. The court determined that the school district's ban of McNett was necessary to maintain tranquility and order at school events and was constitutionally permissible.

DISCUSSION

McNett asserted that he was retaliated against by exercising his First Amendment right of free speech. In order to plead a retaliation claim under the First Amendment, a plaintiff must prove that 1) they engaged in constitutionally protected conduct; 2) that they experienced retaliatory action that is sufficient enough to deter an ordinary person from exercising their constitutional right; and 3) there is a causal link between the constitutionally-protected conduct and the retaliatory action.

In rejecting McNett's claim, the court observed that the right to free speech is not limitless and the government is not powerless to protect against disruptive conduct, including disruptive speech, in public places such as schools that require peace, quiet, and tranquility to carry out their functions. The court noted that "[w]hile the plaintiff would have the Court believe he was only acting in the best interests of his children, unfortunately for him, the record is rich with witnesses and written evidence of what can only be described as truly outrageous behavior." Further, because there was an objectively reasonable basis for the ban imposed on McNett, the court did not believe that the evidence proved that there was a causal connection between any protected speech and the school district's decision to ban McNett from school events.

PRACTICAL ADVICE

The court's decision in *McNett* is instructive for any school district dealing with parents who act inappropriately to school administration, staff, or students while on school property or at school functions. First, the case confirms that a school district is within its constitutional bounds to limit access to parents who conduct themselves inappropriately at school events. Second, the school district in this case adopted a reasonably progressive response to the inappropriate conduct. The administration provided the parent with multiple warnings about his behavior. Additionally, even after the ban was instituted, school officials remained flexible and made exceptions that allowed the parent to attend specific school events upon request. Such actions reinforced the purpose of the school's ban of the parent as avoiding disruption instead of as retaliation for critical speech.

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