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# EDUCATION LAW REPORT

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**Tucker Arensberg PC**

1500 One PPG Place
Pittsburgh, PA 15222
412.566.1212

2 Lemoyne Drive
Lemoyne, PA 17043

**tuckerlaw.com**



## COURT UPHOLDS TERMINATION OF TEACHER FOR SEXUALLY HARASSING CO-TEACHER

*Neshaminy School District v. Neshaminy Federation of Teachers*, 171 A.3d 334 (Commw. Ct. 2017): The Pennsylvania Commonwealth Court held that an arbitrator decision violated public policy by reinstating a teacher after continuous verbal sexual harassment of a co-worker.

### SUMMARY AND FACTUAL BACKGROUND

Neshaminy School District terminated 10-year veteran teacher Jared Katz for continuous sexual harassment of his co-teacher, a female first-year teacher. The two teachers worked together in a 9th grade classroom. According to his co-teacher, Katz made "sarcastic and sexually explicit" comments to the co-teacher "all day, every day." The comments were so continuous that the co-teacher compared them to white noise or background noise. In particular, Katz invited the co-teacher "to sit on his lap in lieu of a chair" and "told her it was taking all of his self control not to kiss her." When the co-teacher asked Katz to stop engaging in this type of behavior in front of students, Katz responded, "So, I shouldn't slap your a**?"

After Katz was terminated, Neshaminy Federation of Teachers filed a grievance on Katz's behalf. The arbitrator reinstated Katz to his position, reducing the termination to a 20-day suspension without pay. The School District appealed the arbitrator's decision to the Court of Common Pleas of Bucks County, which vacated the grievance arbitration decision on the basis that the decision violated the Pennsylvania public policy against sexual harassment. On appeal, the Pennsylvania Commonwealth Court upheld the lower court's decision, supporting the school district's decision to terminate Mr. Katz.

### DISCUSSION

Both the Common Pleas and Commonwealth Courts pointed out that not only did Katz create a hostile work environment, but he also did so in the presence of ninth grade students. The Courts recognized that this behavior "could not only distract the students from their education but also warp the students' understanding of permissible conduct and make them believe such conduct was normal." The Courts expressed concern with the arbitrator's decision to reinstate Katz and place him back in the classroom, in light of this behavior.

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The Courts recognized Pennsylvania's "dominant public policy" against sexual harassment. The Courts explained that a grievance award violated public policy if it encouraged individuals to engage in sexual harassment "without fear of any meaningful consequence." The Commonwealth Court agreed with the lower court that the 20-day suspension imposed by the arbitrator was not a meaningful consequence for Katz's behavior and that to uphold this suspension would "effectively neuter" District policies prohibiting sexual harassment.

## PRACTICAL ADVICE

Although the factual circumstances are different for each case, Pennsylvania Courts have shown a willingness to support school district decisions regarding employees who engage in sexual harassment. Whenever an arbitrator reduces a punishment or termination in this context, the school district should consult with its solicitor and consider appealing the decision in light of the *Neshaminy* opinion.

## COMMONWEALTH COURT HOLDS THAT ADDRESSES CONTAINED IN PROPERTY TAX ASSESSMENT RECORDS ARE PUBLIC RECORDS

*Butler Area School District v. Pennsylvanians for Union Reform*, 1460 C.D. 2014, 2017 WL 4974552, at *1 (Pa. Cmmw. Nov. 2, 2017). The Commonwealth Court of Pennsylvania holds that addresses contained in property tax assessment rolls are public records and are not protected by the right to privacy set forth in Article I, Section 1 of the Pennsylvania Constitution, as construed by the Supreme Court of Pennsylvania in *Pennsylvania State Education Association v. Department of Community & Economic Development*, 148 A.3d 142 (Pa. 2016) ("*PSEA*").

### SUMMARY AND FACTUAL BACKGROUND

In *Butler Area School District v. Pennsylvanians for Union Reform* ("*Butler*"), the Requester submitted a request for records pursuant to the Right-to-Know Law ("RTKL") to the school district ("District") for the property tax assessment rolls prepared by Butler County ("Property List"). The Property List sets forth each property owner's name and address for properties within the geographic confines of the District and is the type of document used to prepare tax duplicates.

The Office of Open Records ("OOR") directed the District to redact the home addresses of District employees and provide the redacted Property List. On appeal, the trial court permitted the District to withhold the entire Property List. The Commonwealth Court reversed the trial court and ordered the District to provide the complete Property List, without redaction.

### DISCUSSION

In October 2016, the Pennsylvania Supreme Court, in *PSEA*, held that Pennsylvanians enjoy a constitutionally-protected right to privacy in their home addresses. The Supreme Court stated that the RTKL was not intended to be used to procure personal information about private citizens or to be a generator of mailing lists. Specifically, the Supreme Court stated: "Public agencies are not clearinghouses of 'bulk' personal information otherwise protected by constitutional privacy rights." *PSEA*, 148 A.3d at 158. Therefore, before releasing a home address in response to a RTKL request, a school district must balance the individual's right to privacy in his or home address against the public benefit in the dissemination of that information. *Id.*, at 156-158.

In *Butler*, the Commonwealth Court held that documents like the Property List, which contain the names and home addresses of individuals and

other entities, are public records in their entirety. Initially, the Commonwealth Court held that the Property List is the type of record that has always been deemed a public record. Citing earlier cases, the Court noted that Pennsylvania has a long-standing practice of mandating access to property assessment records. Moreover, the Court noted that property assessment records are also public by statute, including the Consolidated County Assessment Law, 53 Pa.C.S. 8841(d), and the Second Class County Assessment Law, 72 P.S. 5452.18. Based on these statutes, the Court stated that the General Assembly had already determined that the necessity for making these records public outweighed any privacy interest.

Next, the Court distinguished *PSEA* by noting that the property addresses contained in the Property List correlate to taxable property. Because property addresses are an integral part of tax assessment records and impact the public fisc, they are public in nature. In addition, the properties on the Property List are not necessarily owned by individuals – some are owned by corporations and partnerships. Only individuals, as opposed to persons (including corporations), can assert privacy rights under Article I, Section 1 of the Pennsylvania Constitution.

Finally, the Court held that prior judicial decisions do not support a privacy interest in property addresses, as opposed to home addresses. Privacy applies to personal identifiers, such as personal phone numbers and Social Security numbers, not longstanding public records like the Property List.

Therefore, based on prior case law and current statutes, the Court concluded that there was no individual privacy interest in the Property List. Therefore, the *PSEA* balancing test is inapplicable and the Property List and similar records are public records under the RTKL.

## PRACTICAL ADVICE

*Butler Area School District v. Pennsylvanians for Union Reform*, 1460 C.D. 2014, 2017 WL 4974552, at *1 (Pa. Cmmw. Nov. 2, 2017), is the first limitation on the potentially broad application of the Supreme Court's decision in *PSBA*. Corporate requesters frequently submit RTKL requests for documents like the Property List at issue in *Butler*. Prior to *Butler*, many school districts concluded that, at significant time and effort, they had to redact addresses pursuant to *PSEA*. *Butler* confirms that these lists are now public records in their entirety. Therefore, school districts may grant such requests without concerns about violating the privacy rights of individuals.

The *Butler* court acknowledged that a request for a home address of a specified individual or group of individuals implicates privacy rights protected by *PSEA*. Therefore, if an RTKL request seeks anything other than tax assessment rolls, school districts should consult with their solicitor before granting the request.

## THE COMMONWEALTH COURT HOLDS THAT TIME LIMITS FOR PUBLIC COMMENTS AT SCHOOL BOARD MEETINGS ARE VALID UNDER THE SUNSHINE ACT.

*Sklaroff v. Abington School District*, 2017 WL 4582638 (Pa. Cmwlth. 2017). The Commonwealth Court reaffirms a school district's authority under the Sunshine Act to impose reasonable time limits on citizens' comments during the public comment period of a school board meeting.

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## SUMMARY AND FACTUAL BACKGROUND

In May 2016, Doctor Robert B. Sklaroff ("Parent") attended the Abington School District's regular board meeting. During the citizen comment segment of the meeting, the Parent rose to speak on two issues that were neither on the agenda nor anticipated to be on the board's agenda in the near future. Specifically, the Parent requested adding a semester of mandated Social Studies during twelfth grade and developing a curriculum addressing "Holocaust, Genocide and Human Rights Violations."

The Parent was informed he could only speak for three minutes. That was not the first time the Parent was told about time limits for public comments. The Parent also spoke at the April 2016 meeting and was informed then about the time limits for public comments.

After the Parent had spoken for six minutes at the May 2016 meeting, the board president interrupted the Parent and told him his time to speak had elapsed. Nobody else at the meeting spoke about the two issues the Parent discussed. The School's policy on public comments at board meetings indicated the School should allow "20 minutes for comments on any matter regarding school affairs." Regarding comments on school affairs, the School's policy stated that "a citizen will be recognized once and each citizen's comments will be *limited to three minutes*."

The Parent filed a lawsuit against the School alleging the School violated Pennsylvania's Sunshine Act by limiting his time to speak at the May 2016 meeting. The Parent believed the two issues he raised at the meeting were matters of concern, official action and/or deliberation. The issues, he believed, had already been or would be before the board. However, the Parent admitted he could not confirm this was true because of the School's failure to communicate items on their agendas before meetings and its refusal to schedule a follow-up meeting at the Parent's request.

The School filed preliminary objections to the Parent's complaint. The Court of Common Pleas of Montgomery County sustained the School's preliminary objections and dismissed the Parent's complaint. The Parent appealed the trial court's order to the Commonwealth Court.

## DISCUSSION

Section 710.1 of the Sunshine Act states, in relevant part, that "the board…of a political subdivision… shall provide a reasonable opportunity at each advertised regular meeting…to comment on matters of concern, official action or deliberation which are or may be before the board . . . prior to taking official action." 65 Pa. C.S. § 710.1(a).

The Commonwealth Court noted that the Sunshine Act only gives a citizen at a public meeting a right to a "reasonable opportunity" to comment on matters of concern, official action or deliberation which are or may be before the board. Limiting public comments at a board meeting does not violate the Sunshine Act, as long as a person is not completely denied the opportunity to speak. The Court also noted that subject-matter limitations on public comments at a school board meeting are "patently reasonable and in no way violate the [Sunshine Act]."

Regarding the School's three-minute limit policy, the Court stated that such a policy was valid in light of Section 710 of the Sunshine Act, which provides, in relevant part: "[n]othing in this chapter shall prohibit the agency from adopting by official action the rules and regulations necessary for the conduct of its meetings and the maintenance of order." 65 Pa. C.S. § 710.

The Court noted the Parent had pled he was afforded approximately six minutes to speak on topics that were neither on the agenda nor anticipated to be thereon in the near future. Accordingly, there was no indication under the facts the Parent pled that

the "public participation" provision of the Sunshine Act, which prescribes only a reasonable opportunity to comment, were violated. As a result, the Commonwealth Court affirmed the trial court's order sustaining the School's preliminary objections and dismissing the Parent's complaint.

## PRACTICAL ADVICE

This case is a reminder that school districts are allowed to set time limits for public comments at board meetings. If your school district has not adopted a policy for public participation at a board meeting that includes time limits for each speaker, this case is a signal that it may be time for your school's administration to work with its solicitor to revise its policy accordingly. Further, once a school district has adopted a policy for public comment that includes time limits, it is recommended that the board chairperson enforce said time limits uniformly.

## SCHOOL CODE UPDATE: SCHOOL BOARDS MUST PROHIBIT LUNCH SHAMING

On Sunday, November 5, 2017, Governor Wolf allowed HB 178, the omnibus School Code bill, to become law without his signature. The bill, now Act 55 of 2017, among other things, amends Section 1337 of the School Code to prohibit "lunch shaming."

Specifically, to ensure that "lunch shaming" no longer occurs in Pennsylvania school districts, Act 55 imposes the following responsibilities on school boards:

- School boards must establish a requirement that a school food program meal is provided to every student who requests one regardless of whether the student can pay or owes money (unless a student's parents have provided directive to the school to withhold a meal). *See* 24 P.S. 13-1337(d)(2).

- When any student owes money for five or more school meals, school boards must require that their schools make at least two attempts to reach the student's parents or guardians to have them apply for participation in the free or reduced lunch program. Schools may offer assistance in helping the parents or guardians apply for the program. *See* 24 P.S. 13-1337(d)(3).

- School boards must require that their schools direct all communications regarding money owed by a student to the student's parents or guardians and not to the student. Schools may contact a student's parents or guardians via a letter addressed to the parent but delivered by the student. *See* 24 P.S. 13-1337(d)(4).

- School boards must prohibit their schools from: 1) publically identifying or stigmatizing any student who cannot pay or who owes money for school meals;

  2) requiring any student who cannot pay to perform chores; or

  3) requiring a student to discard a school meal after it was served if the student can't pay or owes money. *See* 24 P.S. 13-1337(d)(5).

These requirements became effective on December 5, 2017. School boards should review their policies with their Solicitor to ensure that they are in compliance with Act 55's anti "lunch shaming" requirements.

## CITIZEN'S SUIT AGAINST INDIVIDUAL SCHOOL DIRECTORS FOR CATEGORICAL BAN FROM ATTENDING FUTURE SCHOOL BOARD MEETINGS DISMISSED

*Barna v. Board of School Directors of the Panther Valley School District*, Case No. 15-3904 (3d Cir. 2017). The United States Court of Appeals for the Third Circuit affirmed the dismissal of a citizen's suit against individual school directors after they categorically banned him from attending future school board meetings due to threatening and disruptive conduct.

### SUMMARY AND FACTUAL BACKGROUND

John Barna filed a lawsuit under 42 U.S.C. § 1983 alleging that the school board of the Panther Valley School District violated his First Amendment rights by categorically banning him from attending Board meetings after he was threatening and disruptive on several occasions.

Barna attended a school board meeting at which he expressed concern about a particular school district contract. Barna mentioned that he and his friends were confused by the contract, which they perceived as a waste of public resources. The school board President responded by suggesting that Barna bring his friends to the next meeting to which Barna replied: "You wouldn't like that. Some of my friends have guns." Barna later contended that this remark was a joke.

Barna attended the following school board meeting and the school board President told Barna: "Since you say that you have friends with guns, I'm going to have to ask you to leave." Barna stated: "Don't laugh. I may have to come after all of yous." Some meeting attendees construed the remark as a threat. Barna alleged that after leaving the meeting room, another school board member standing in the hallway made threatening gestures toward him. A security guard restrained Barna as he attempted to follow the school director. Barna then returned to the board room and stated that the school director "just threatened [his] life." The next day, the school district superintendent informed Barna by letter that he would be banned from future attendance at board meetings if he engaged in any threatening or disorderly conduct.

Barna subsequently attended several Board meetings without incident. While attending a meeting several months later, Barna raised his voice and became confrontational after being denied the opportunity to ask questions. The school board President stood up at some point, which Barna apparently interpreted as an invitation to fight. Barna stated: "Do you want to fight? Let's go." Barna admitted that during the meeting he "blew [his] top" and was "just mad." The Board convened again the next day, at which point Barna apologized for his conduct to some, but not all, of the school board members. During a brief recess at the meeting, Barna uttered "[s]on of a bitch" within earshot of meeting attendees, including some children.

Subsequently, the school solicitor sent Barna a letter barring him from attending all Board meetings or school extracurricular activities because his conduct had become "intolerable, threatening and obnoxious" and because he was "interfering with the function of the School Board." Barna was informed, however, that he was permitted to submit "reasonable and responsible" written questions to the school board, which would be answered in a timely manner.

Barna then filed this suit against individual school directors alleging violations of his First Amendment right to free speech and violations of his First and Fourteenth Amendment rights to be free from unconstitutional prior restraint. The District Court

granted summary judgment in favor of both the Panther Valley school board as an entity and the individual school directors. The federal court of appeals sustained the decision in favor of the individual school directors, but remanded the case to the trial court for further proceedings upon Barna's claims against the school entity.

## DISCUSSION

A plaintiff seeking relief under 42 U.S.C. § 1983 must demonstrate that the defendants, acting under color of law, violated the plaintiff's federal constitutional or statutory rights, and thereby caused the complained of injury. A defendant sued under § 1983 is entitled to qualified immunity unless it is shown that the official violated a statutory or constitutional right that was "clearly established" at the time of the challenged conduct. A right is considered "clearly established" when a reasonable public official would understand that what he is doing violates that right.

The federal appeals court noted that neither it nor the United States Supreme Court had previously ruled upon the constitutionality of a categorical prohibition of an individual citizen's attendance at a public meeting of a local board. The court acknowledged that it had twice upheld the temporary removal of a disruptive participant from a limited public forum like a school board meeting as not violating constitutional rights. The court considered two decisions from other federal courts that reached conflicting results, thus determining that there was no consensus upon the legal question of the permissibility of a wholesale ban from attending public meetings.

In the absence of consistent court decisions on the subject or of any controlling precedent, the court concluded that the ban by school officials of Barna from future school board meetings did not violate a "clearly established" constitutional right. Thus, the individual school officials were entitled to qualified immunity from Barna's suit and, therefore, his claims against them were properly dismissed by the trial court. However, because the principle of qualified immunity does not apply to the school entity itself, the court allowed Barna's case to proceed against the school district.

## PRACTICAL ADVICE

As discussed in the court's decision in Barna, courts consistently have allowed local government officials to temporarily remove disruptive participants from municipal and school board meetings to prevent interruptions, disregard of rules of decorum and disruptive behavior. However, as demonstrated by the Barna decision, the constitutional propriety of a categorical exclusion of an individual citizen from attending or participating in public meetings has not been extensively litigated. Notably, because its decision was premised upon the application of the principle of qualified immunity, the Third Circuit did not rule upon this fundamental issue.

Thus, at present, school officials can proceed without reservation to temporarily remove citizens from public meetings for disruptive or threatening conduct. Pending further court decisions or controlling precedent either from the Third Circuit or the U.S. Supreme Court, however, it cannot be stated that a categorical ban from attendance likewise is constitutional. Thus, any decision to ban a citizen from future attendance or participation at meetings should be carefully considered in the context of the severity and pervasiveness of the disruptive or threatening conduct and, as was done in Barna, coupled with the provision of an alternative means for the citizen to obtain information or submit comments for school officials' consideration.

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

**Frederick J. Wolfe**
412.594.5573
fwolfe@tuckerlaw.com

**Robert L. McTiernan**
412.594.5528
rmctiernan@tuckerlaw.com

**William Campbell Ries**
412.594.5646
wries@tuckerlaw.com

**Kenneth G. Scholtz**
412.594.3903
kscholtz@tuckerlaw.com

**Irving S. Firman**
412.594.5557
ifirman@tuckerlaw.com

**Gavin A. Robb**
412.594.5654
grobb@tuckerlaw.com

**Edward R. Lawrence, Jr.**
412.594.3942
elawrence@tuckerlaw.com

**Christopher Voltz**
412.594.5580
cvoltz@tuckerlaw.com

**Thomas P. Peterson**
412.594.3914
tpeterson@tuckerlaw.com

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

**Steve R. Bovan**
412.594.5607
sbovan@tuckerlaw.com

**David Mongillo**
412.594.5598
dmongillo@tuckerlaw.com

**Daniel C. Conlon**
412.594.3951
dconlon@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**

**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.