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FEDERAL COURT HOLDS THAT BANNING A COMMENTER FROM A PUBLIC OFFICIAL'S PUBLIC FACEBOOK PAGE VIOLATES THE COMMENTER'S RIGHT TO FREE SPEECH

Davison v. Loudoun County Bd. of Supervisors, 1:16CV932 (JCC/IDD), 2017 WL 3158389 (E.D. Va. July 25, 2017). The District Court for the Eastern District of Virginia issued a declaratory judgment holding that an elected official's Facebook page operated as a forum for speech under the First Amendment to the U.S. Constitution and that the elected official violated Plaintiff's right of free speech when the official banned Plaintiff from her Facebook page.

SUMMARY AND FACTUAL BACKGROUND

In *Davison v. Loudon County Board of Supervisors*, Defendant, Phyllis J. Randall, Chair of the Loudoun County Board of Supervisors, temporarily banned the Plaintiff from posting on her "Chair Phyllis J. Randall" Facebook page ("Facebook Page") because she was offended by his criticism of her "colleagues on the School Board," whom he had accused of unethical behavior.

The Plaintiff sued under 42 U.S.C. § 1983 and alleged, among other things, that the temporary ban from the Facebook Page violated his rights to free speech. After conducting a bench trial, the court agreed with Plaintiff and held that the Facebook Page was a public forum and that the Defendant violated Plaintiff's First Amendment rights by banning him from that forum for making comments that offended the Defendant.

DISCUSSION

The court first found that the Facebook Page was "governmental" (as opposed to private) in nature, and thus subject to constitutional constraints. While the Defendant personally maintained and owned the Facebook Page and posted on the page through personal devices, the court found that the Facebook Page was governmental in nature because it arose out of public, not personal reasons. In other words, because the Facebook Page was created when the Defendant was elected, it was maintained by County employees, it was used to communicate with constituents, and it was referenced in County newsletters, the court found that the Facebook Page was public.

Next, the court found that the Defendant violated Plaintiff's First Amendment rights when she temporarily blocked him from access to the Facebook Page.

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Importantly, the Defendant banned the Plaintiff because she was offended by his post accusing her "colleagues on the School Board" of unethical behavior. Moreover, she did not ban the Plaintiff pursuant to any neutral policy or practice that she has applied in an evenhanded manner. In fact, to the extent she had a policy on commenting, it expressly invited any and all comments on any issues.

The court found that this sort of governmental "designation of a place or channel of communication for use by the public" was more than sufficient to create a public forum for speech.

The right to free speech is subject to some limitations, but the Supreme Court's First Amendment jurisprudence makes clear that speech may not be restricted by the government simply because it offends. See *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017) (listing cases). Moreover, the suppression of critical commentary regarding elected officials is the quintessential form of viewpoint discrimination against which the First Amendment guards. By prohibiting Plaintiff from participating in her online forum because she took offense at his claim that her colleagues in the County government had acted unethically, the court found that "Defendant committed a cardinal sin under the First Amendment."

Therefore, the Court declared that Defendant did in fact violate Plaintiff's right of free speech under the First Amendment to the United States Constitution.

PRACTICAL ADVICE

While the Defendant's actions in this case were contrary to law, not all Facebook pages maintained by elected officials are governmental in nature. Moreover, if a Facebook page is public, it may still be monitored and inappropriate comments and commenters can be banned if done pursuant to an objective policy. The court recognized that social media websites may be monitored because moderation is necessary to preserve social media websites as useful forums for the exchange of ideas. The court also indicated that neutral, comprehensive social media policies — eschewed here by the Defendant — are acceptable. The court specifically stated that the Defendant could adopt new policies for the "Chair Phyllis J. Randall" Facebook page or disallow comments altogether.

Therefore, political subdivisions and their elected officials and employees who maintain public social media sites should work with their solicitors to generate content-neutral, comprehensive social media policies to insulate themselves from potential First Amendment challenges.

TAX APPEALS BASED ON PROPERTY TYPE MAY VIOLATE STATE CONSTITUTION

Valley Forge Towers Apartments N, L.P. v. Upper Merion Area School Dist., 2017 Pa. LEXIS 1520, 163 A.3d 962 (Pa. July 5, 2017). (The Pennsylvania Supreme Court holds that school district's tax assessment appeal policy violated state uniformity clause).

SUMMARY AND FACTUAL BACKGROUND

The Upper Merion Area School District is located in Montgomery County, Pennsylvania, where the most recent countywide assessment of real property occurred in 1996. Since then the market value of many of the parcels in the County changed, including properties within the School District, leading to significant discrepancies in assessments.

To remedy this, the School District decided to appeal assessment of some of the properties within its boundaries, and the District contracted with a third party, Keystone Realty Advisors, to identify and recommend property assessments that the

School District should appeal. On Keystone's suggestion, the School District concentrated solely on commercial properties, including apartment complexes. The School District took this approach because commercial property values were generally higher than those of single family homes, and therefore raising commercial assessments would result in greater tax revenue than doing the same with under-assessed single family homes. Another alleged factor motivating the School District's decision was that most residential homes are owned by School District residents and appeals on such residential assessments might be politically unpopular.

Valley Forge Towers Apartments N, L.P. owned apartment complexes in the School District and the School District filed appeals to increase its assessments. The Montgomery County Board of Assessment Appeals denied the appeals, resulting in no assessment change. The School District then appealed to Common Pleas Court. While the appeals were pending, Valley Forge filed a separate lawsuit against the School District on the basis that its actions violated the Pennsylvania Constitution's Uniformity Clause. Under this Clause, "All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." The constitutional violation allegedly occurred because the School District appealed only the assessments of commercial properties. Valley Forge argued that its claim was directed to combat an overall strategy of the School District to discriminate against commercial properties by targeting them for administrative appeals while ignoring similarly under-assessed single family homes. Valley Forge sought a declaration that the School District's actions were an unconstitutional application of the laws allowing tax assessment appeals by taxing bodies.

The School District filed preliminary objections to this complaint on the basis that it had a statutory right to appeal property assessments and that selective appeals do not violate the uniformity clause as a matter of law. Common Pleas Court sustained these preliminary objections and dismissed Valley Forge's complaint on the basis that the filing of selective appeals does not result in a uniformity violation. In this regard the trial court concluded that the Uniformity Clause did not require equalization of all sub-classifications of real property.

Valley Forge then appealed the matter to Commonwealth Court which affirmed the trial court's decision, holding that equalization of assessments was not required across all property sub-classifications. Commonwealth Court recognized that the School District did create sub-classifications of properties which it treated differently from others, but the Court concluded that no constitutionally-suspect classification was made and therefore was constitutionally permissible as long as it satisfied the deferential rational basis test. This test was met because the School District's purpose was to increase revenues. Moreover, the Court opined that Valley Forge failed to raise a substantial constitutional challenge in the manner in which any tax statute was applied. In this respect, Commonwealth Court found the constitutional claim insubstantial because, under prior cases, taxing districts could select properties for appeal based on financial considerations. Further, the Court found that pursuant to state general county assessment law, a party that appeals to court from a property board decision may always allege a Uniformity Clause violation.

Upon petition by Valley Forge, the Pennsylvania Supreme Court granted review to consider whether the Uniformity Clause permitted the School District, pursuant to its right to appeal individual property assessments, to concentrate solely on commercial properties while foregoing appeals as to single family residences.

LEGAL REASONING

As an initial premise, the Pennsylvania Supreme Court noted that under the Uniformity Clause, all property in a taxing district is a single class and is entitled to uniform treatment. The Court found that

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the lower courts erred in concluding that different treatment of certain property sub-classifications for appeal purposes was permissible if there was a rational basis for such treatment. While it was without dispute that the appeal policies could not be based on clearly wrongful conduct (e.g., race discrimination), the Court explained that the prohibition against disparate treatment of any class or sub-class of property applies to any intentional or systematic enforcement of the tax laws.

Accordingly, the Supreme Court explained that school districts and taxing bodies could not implement a systematic program of only appealing the assessments of one sub-classification of property, when that sub-classification is drawn according to the residency status of the property owner or the property type. The Court indicated that nothing in its opinion should be construed as suggesting that the use of a monetary threshold or some other collection criteria would violate uniformity if it was implemented without regard to the type of property in question or the residency status of the owner.

The Supreme Court observed that limitations imposed by the Uniformity Clause are not formal abstract arguments. The Court noted that as "every tax is a burden," it was important that the public has confidence that property taxes are administered in a just and impartial manner, with each taxpayer contributing his or her fair share of the cost of government. Where there is a conflict between maximizing revenue and insuring a fair, nondiscriminatory tax system, the Uniformity Clause requires the latter be given more importance, but the objectives do not necessarily conflict. A particular appeal policy employed by a taxing district lies within its discretion but the Court's task is limited to enforcing the constitutional boundaries of any such approach. Thus, the Court concluded that the preliminary objections of the School District should not have been granted and remanded the case for further proceedings before the trial court.

PRACTICAL ADVICE

Because the *Valley Forge* case was technically remanded, the matter is far from closed. However, the Court's opinion makes clear that tax appeal programs by schools that focus on certain business properties, or only on business properties, are invalid. Appeal programs with uniform standards that encompass all types of properties are allowable and the decision implies that monetary minimum thresholds for appeals would be found proper.

STUDENTS' PRIVACY CLAIMS FAIL TO UPEND SCHOOL DISTRICT'S TRANSGENDER RESTROOM POLICY

Doe v. Boyertown Area School District, 2017 WL 3675418 (E.D. Pa. 2017) (A Pennsylvania federal court denied a motion for a preliminary injunction in a case brought by four students (plaintiffs) in opposition to school policy permitting transgender students to use district restrooms and locker rooms aligning with their sexual identity instead of their biological sex).

SUMMARY BACKGROUND

A recent graduate and several current students of the Boyertown Area School District brought suit in the United States District Court for the Eastern District of Pennsylvania contending that the school district's practice of allowing transgender students to use district restrooms and locker rooms aligning with their sexual identity instead of their biological sex violated their right to privacy and created a sexually hostile educational environment.

One male student complained that he saw a female, who was changing in the boys' locker room for gym class, while he was in his underwear. He brought this to the administration's attention and was told that the other student had permission to

be there as a transgender male. The school offered him the opportunity to change in a private area rather than the boys' locker room. However, the male student did not change for gym at all and lost some points on his grade. He also used restroom facilities less frequently out of concern for seeing students of the opposite sex in these areas.

Another male plaintiff indicated that, while changing in the locker room, a fellow student called his attention to another student in the locker room who was wearing a short gray top and short shorts. He stated this student was a girl and that he was partially undressed at the time. Subsequently, when entering the boys' locker room, the student sought a sufficiently private area to avoid seeing or being seen by students of the opposite sex. Further, he limited his use of restrooms due to the practice.

A female student, upon seeing a student in the girls' bathroom that she believed was male, reported the incident to the administration, whereupon she learned of the school's policy allowing students of a different biological sex to use the bathrooms of the gender with which they identify. The student expressed privacy concerns when using the girls' restrooms where a boy might hear her relieving herself or opening menstruation-related products. Sometimes thereafter, she used the nurse's office and shower stalls with curtains in the locker room whenever she desired privacy.

The fourth plaintiff, also female, learned about the school's practice from one of the male plaintiffs. She claimed to have experienced fear and distress about the possibility of a boy entering the girls' room and noted girls often changed underwear in the locker room and had genitalia exposed.

The introduction to the court's opinion aptly summarized the legal and cultural context of the issues presented by the students' complaint:

"The current issue before the court — whether the court should issue a preliminary injunction prohibiting a school district from maintaining its practice…of allowing transgender students to use the bathrooms and locker rooms of the sex to which they identify — involves intricate and genuine issues relating to, inter alia, the personal privacy of high school students, a school district's discretion and judgment relating to the conduct of students in its schools, the meaning of the word "sex" in Title IX, and the rights of all students to complete access to educational opportunities, programs, and activities available at school.

The general issue of transgender persons' access to privacy facilities such as bathrooms has recently received nationwide attention, and the issue of transgender students' access to educational institutions' bathrooms and locker rooms aligning to their gender identity has spurred litigation with unsurprisingly inconsistent results.

With regard to cases involving transgender students, they have generally centered on whether precluding transgender students from using facilities consistent with their gender identity violates those students' rights under the Equal Protection Clause of the Fourteenth Amendment or Title IX. And as to Title IX, which generally precludes public schools receiving federal financial assistance from discriminating "on the basis of sex," this has resulted in a debate as to whether "sex" refers to biological sex (which the plaintiffs in this case define as a person's classification as male or female at birth based on the presence of external and internal reproductive organs) or a broader and arguably more contemporary definition of sex that could include sex stereotyping or gender identity."

"Here, the court is presented with four students… claiming that the defendant school district's practice of allowing transgender students (who the plaintiffs choose to identify as "members of the opposite sex" rather than as transgender students) to access bathrooms and locker rooms consistent with their gender identity violates 1) their constitutional right to privacy under the Fourteenth Amendment, 2) their right of access to educational opportunities, programs, benefits, and activities under Title IX because they are subject to a hostile environment, and 3) their Pennsylvania common law right of

privacy preventing intrusion upon their seclusion while using bathrooms and locker rooms. The plaintiffs not only raise concerns with being in privacy facilities with transgender students regardless of whether the transgender students actually view them in a state of partial undress, but they raise concerns with the possibility of viewing a transgender person in a state of undress or having a transgender person present to hear them while they are attending to their personal needs while in the bathroom. At bottom, the plaintiffs are opposed to the mere presence of transgender students in locker rooms or bathrooms with them because they designate them as members of the opposite sex and note that, inter alia, society has historically separated bathrooms and locker rooms on the basis of biological sex to preserve the privacy of individuals from members of the opposite biological sex."

Following an evidentiary hearing upon the students' request for entry of a preliminary injunction, the federal court denied the motion concluding that the plaintiffs were unlikely to prevail on the merits of their claims.

DISCUSSION

The court rejected the students' argument that their right to privacy extends to protection from the transgender students hearing them use the restroom or observing them in a state of undress in locker rooms. It observed that no court had yet recognized a constitutional right as broad as that asserted by the students. Thus, the court explained that privacy claims under the Fourteenth Amendment require fact-intensive and context-specific analysis.

The court then examined the extent that the school's practice infringed upon the plaintiffs' privacy rights regarding the involuntary exposure of the intimate parts of the body (or even the possible disclosure of their partially clothed bodies) and whether the infringement is narrowly tailored to serve a compelling state interest. The school district demonstrated that no student was required to change in or use facilities which would make him or her uncomfortable and that it offered, or would be implementing, a range of privacy options, such as single-user restrooms and the installation of dividers in bathroom stalls and curtains in shower stalls. The court held that "[s]ince this matter does not involve any forced or involuntary exposure of a student's body to or by a transgender person and [Boyertown] has instituted numerous privacy protections and available alternatives for uncomfortable students or to protect against the involuntary exposure of a student's partially clothed or unclothed body, the plaintiffs have not shown that [Boyertown has] infringed upon their constitutional privacy rights." Further, noting that several court decisions have concluded that, because some school districts have been found liable for school policies restricting transgender students' use of restrooms, the court concluded that the school district had a compelling state interest not to discriminate against transgender students.

The court also concluded that the students' likely could not prove a claim of a Title IX violation. The court agreed with the school district's argument that all students were being treated equally under its practice and, therefore, the plaintiffs could not demonstrate that they were being discriminated against on the basis of sex. "The practice applies to both the boys' and girls' locker rooms and bathrooms, meaning that cisgender boys potentially may use the boys' locker room and bathrooms with transgender boys and cisgender girls potentially may use the girls' locker room and bathrooms with transgender girls."

PRACTICAL ADVICE

This *Boyertown* case is the converse of suits brought to invalidate school policies precluding transgender students from using facilities consistent with their gender identity. The court's decision

aligns with other recent federal court decisions that have found restrictive facility policies to violate the constitutional rights of transgender students.

It can be expected that these issues will continue to be litigated with potentially varying results until such matters finally are addressed by the United States Supreme Court. In 2016, the Supreme Court agreed to review a Fourth Circuit court ruling in the matter of *Gloucester County School Board v. G.G.*, 822 F.3d 709 (4th Cir. 2016). However, with the change in federal administrations in 2017, the Departments of Justice and Education issued guidance documents that contravened those provided by the prior presidential administration. The Supreme Court remanded the case for further consideration by the appellate court in light of the revised guidance. Consequently, school districts will need to continue to monitor the continuing legal developments on these issues.

Meanwhile, the practice of allowing transgender students to use restroom and locker room facilities consistent with their gender identity is the course most likely to avoid successful claims against school districts.

A REMINDER OF OCR GUIDANCE REGARDING STUDENTS WITH ADHD

School Districts should keep in mind last year's guidance from the U.S. Department of Education Office of Civil Rights (OCR) that students with attention deficit/hyperactivity disorder (ADHD) are entitled to equal educational opportunity under Section 504 of the Rehabilitation Act of 1973.

The Department of Education issued this guidance after noticing, over a five-year period, that more than ten percent of complaints received by OCR alleged discrimination against students with ADHD. OCR also published *Students with ADHD and Section 504: A Resource Guide*, intended to help school districts identify eligible students and provide appropriate services. The resource guide is available at:

https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201607-504-adhd.pdf

OCR noted several common problems related to 1) identification of students with ADHD and 2) the services provided to students with ADHD. Below is a summary of the problems identified by OCR:

1. **Identification of students with ADHD**
   OCR noted that Districts often:

   Fail to identify students who need evaluation. Districts should remember that when staff believes a student may have ADHD (or any disability) the District has a responsibility to conduct an evaluation. Districts should not rely solely on parental requests to initiate the evaluation process.

   Fail to identify students in a timely manner

   Conduct inadequate evaluations of students

2. **Services provided to students with ADHD**
   OCR noted that Districts often:

   Make inappropriate decisions regarding services provided, because they misunderstand ADHD and the requirements of Section 504

   Fail to distribute documentation (such as 504 plans) to appropriate staff

   Inappropriately consider financial and administrative burdens when selecting aids and services

PRACTICAL ADVICE

School Districts should periodically examine the special education services being provided to students to ensure compliance with applicable laws and regulations. School Districts should consult with solicitors with regard to legal questions that may arise during this process. Doing so will help protect Districts from costly special education litigation.

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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.