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COMMONWEALTH COURT HOLDS THAT SCHOOL SURVEILLANCE VIDEOS SHOWING INTERACTIONS BETWEEN ADULTS AND STUDENTS ARE NOT EDUCATION RECORDS UNDER FERPA AND ARE PUBLIC RECORDS UNDER THE RTKL

Easton Area Sch. Dist. v. Miller, 191 A.3d 75 (Pa. Cmmw. 2018). The Commonwealth Court holds that a school bus surveillance video that depicted a school teacher roughly disciplining a student was not an "education record" under the federal Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g because the video directly related to the teacher, not the students. *Central Dauphin School District v. Hawkins*, 2018 WL 6441638 (Pa. Commw. December 10, 2018). The Commonwealth Court holds that school bus surveillance video that recorded a confrontation between a student and a parent of another student was not an "educational record" of the student under FERPA because it was not directly related to the student or maintained by the District.

BACKGROUND

In each case, a requester submitted a request to a school district ("District") pursuant to the Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101 et seq., for a video from a District school bus security camera. In *Miller*, the video depicted a teacher roughly disciplining a student. In *Hawkins*, the video depicted a confrontation between a student and a parent of another student.

In both cases, the Districts denied the requests, arguing that the videos were exempt because they were education records of the students depicted in the videos under FERPA. The Office of Open Records ("OOR") held that the requested videos were not education records under FERPA and ordered the Districts to release the video. On appeal, the trial courts affirmed the OOR's holdings.

DISCUSSION

FERPA prohibits schools receiving federal financial assistance from disclosing "sensitive information about students" without parental consent. Specifically, Section 1232g(b)(1) of FERPA provides no federal funds shall be made available to a school district that has a policy or practice of permitting the release of education records (or personally identifiable information contained therein) without the consent of the students' parents. 20 U.S.C. § 1232g(b)(1).

Under FERPA, education records are defined as materials that: 1) contain information directly related to a student; and 2) are maintained by a school district. 20 U.S.C. § 1232g(a)(4)(A). A record must meet both parts of the definition to qualify as an education record.

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In *Miller*, the court held that while an “education record” has a reach beyond a student’s academic transcript, the video at issue was not an educational record because it depicted the teacher abusing the student and only tangentially related to the student. The *Miller* court explained that a video “is only an educational record with respect to a student in the video for whom the video may have consequences.” Therefore, the *Miller* court held that the video did not meet the “directly related” prong of the definition of education record and ordered that the video be disclosed.

In *Hawkins*, the video recorded a confrontation between a student and a parent. While the parent was criminally charged for her conduct, the District did not submit any evidence regarding whether the video was used to discipline the unnamed student. Accordingly, consistent with its holding in *Miller*, the court found that the District failed to demonstrate that the video directly related to the student.

The *Hawkins* court examined the second part of the definition and found that the video was not an education record because it was not “maintained” by the District. In *Owasso Independent School District No. I-011 v. Falvo*, 534 U.S. 426, 433, 122 S.Ct. 934, 151 L.Ed.2d 896 (2002), the U.S. Supreme Court explained that to meet the “maintained” prong of the definition, a record must be kept in a filing cabinet in a records room at the school or on a permanent secure database and be subject to a maintenance protocol. The *Hawkins* court found that the video was not “maintained” by the District because the District did not have a maintenance protocol for school bus videos and that such videos were not permanently maintained.

CONCLUSION

Though the Commonwealth Court narrowed the FERPA exception in the *Miller* and *Hawkins* decisions, the court did not hold that every school bus video is a public record and not subject to the protections of FERPA.

For example, the *Miller* court distinguished its holding from another case, *Bryner v. Canyons School District*, 351 P.3d 852 (Utah Ct. App. 2015), which involved a surveillance video capturing an altercation between students. The *Miller* court stated *Bryner* was distinguishable because the video in that case contained information directly related to the students committing misconduct whereas the video in this case depicted a teacher’s alleged misconduct.

Moreover, the Commonwealth Court asserted that both decisions are consistent with guidance issued by Department of Education on its website. This guidance provides that a surveillance video showing two students fighting in a hallway that is used as part of a disciplinary action is “directly related” to the students fighting. Moreover, this guidance explains that, with respect to the maintenance requirement, a photo or video that shows two students fighting which is maintained in the students’ disciplinary records is “maintained” by the District under FERPA.

Accordingly, a school district should always consult with its solicitor before releasing a video involving a student pursuant to a RTKL request because determining whether a video is an education record of a student can be a fact-sensitive determination.



IMMORALITY ILLUSTRATED: COURT AFFIRMS PRINCIPAL’S TERMINATION AFTER SECOND DUI ARREST

Moffitt v. Tunkhannock Area School District, 192 A.3d 1214 (Pa. Commw. Ct. Aug. 18, 2018). The Pennsylvania Commonwealth Court affirmed an elementary school principal’s termination, because sufficient evidence supported termination on the basis of immorality after his second DUI conviction.

BACKGROUND

Joseph P. Moffitt served as principal of two elementary schools in the Tunkhannock Area

School District (District). While serving as principal, Moffitt was arrested twice for driving under the influence (DUI) - once in June 2010 and again in April 2014. His first arrest was resolved by an accelerated rehabilitative disposition program. But after his second arrest, Moffitt pled guilty to the DUI charge and received 90 days of house arrest, in addition to a twelve-month suspension of his driver's license and five years' probation.

Following his second conviction, the School District afforded Moffitt a pre-disciplinary hearing. After the hearing, the School Board notified Moffitt that the District had recommended for his dismissal from employment; an evidentiary hearing would be held to determine whether he would be dismissed; and he had been suspended without pay.

At the evidentiary hearings and via depositions, eight witnesses testified in support of the School District's position, including the District's Acting Superintendent, the District's middle school principal, a District teacher and resident, and two District parents. All of these witnesses echoed the sentiment that Moffitt's two DUI offenses constituted immorality, were unacceptable behavior for a principal, and rendered him unable to be a good role model for the District's students.

The Board voted to terminate Moffitt at its September 8, 2016 public meeting and forwarded him an adjudication by the Board's hearing officer which provided the reasons for his dismissal. Moffitt appealed the adjudication to the Pennsylvania Secretary of Education. On May 9, 2017, the Secretary issued an order denying Moffitt's appeal. The Secretary found the District had established grounds for termination on the basis of immorality, pursuant to Section 1122 of the School Code. The Secretary held that the District's eight witnesses' testimony supported the conclusion that Moffitt's DUIs offended the morals of the community and set a bad example for the District's students. Further, Moffitt had not presented any competent or credible evidence to rebut the School District's position.

Moffitt appealed the Secretary's decision to the Commonwealth Court, arguing that there was

insubstantial evidence to support his termination. The Court affirmed the Secretary's decision and thereby upheld Moffitt's dismissal for immorality.

DISCUSSION

The Commonwealth Court acknowledged that Section 1122(a) of the Pennsylvania Public School Codes provides that professional employees may be terminated, among other reasons, for "immorality." 24 P.S. § 11-1122(a). Although it is not explicitly defined by the School Code, Pennsylvania case law defines immorality as a course of conduct that offends the morals of a community and is a bad example to the youth whose ideals a professional educator is supposed to foster and elevate.

Moffitt argued before the Court that the Secretary lacked substantial evidence that his conduct offended the morals of the community. According to Moffitt, the witnesses' testimony focused less on whether his conduct offended the morals of the community, and more on whether the loss of his driver's license rendered it impossible for him to do his job as principal. The Court disagreed, finding that the lengthy hearing and deposition records indicated otherwise. Because the Secretary had found the District's witnesses to be credible, the Court afforded great weight to their testimony. Given this extensive testimony by teachers and parents that Moffitt's conduct set a bad example for students and was offensive to the morals of their community, the Court affirmed the Secretary's decision to dismiss Moffitt for immorality.

Moffitt also argued that the School District's dismissal of him was an action of retaliation for an unrelated federal civil rights lawsuit which he filed against the District; that the District violated the Americans with Disabilities Act for dismissing him while he was in treatment for alcoholism; and that the decision to terminate him was contrary to findings of the Commonwealth's Professional Standards and Practices Commission. The Court dismissed all of these arguments, stating that there was no basis in the record to conclude that his employment was terminated for any other reason than those enunciated by the School Board and Secretary.

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PRACTICAL ADVICE

Multiple convictions for driving under the influence may seem like an obvious, ample justification to dismiss a school principal or any other professional school employee. However, school districts should take care to fully establish that dismissal of the employee is warranted for immorality under Section 1122 of the School Code. In this case, the District presented a range of witnesses, from parents of students through the Acting Superintendent, who consistently testified that the Moffitt’s DUIs made him an inappropriate role model for the District’s students. The Secretary and the Commonwealth Court placed great weight on the credibility and uniformity of the testimony of these witnesses. This case serves as a good example that school districts ought to build an extensive record, including the testimony multiple witnesses, to provide sufficient evidence to support termination of a professional employee for immorality.



PARENT’S LEGAL OWNERSHIP OF RESIDENCE DEFEATS CLAIM OF HOMELESS STATUS

D.C. ex rel. C.C. and M.C. vs. Wallingford-Swarthmore School District, 2018 WL 3968866 (E.D. Pa. August 18, 2018) (Federal district court concludes that children did not qualify for continued enrollment as “homeless” children where father had legal ownership of residence in another school district).

BACKGROUND

On October 10, 2010, a tree fell on the house of D.C. and his two minor children. The house was located in the Wallingford-Swarthmore School District (“District”). The house was condemned and DC and his children then lived at several other properties, including the home of their surrogate mother located in another school district, but continued to attend school within the District.

The surrogate mother previously lived with D.C. and testified that, although not the natural mother of D.C.’s children, she had raised them since they

were infants. Her home had three bedrooms, but only two bedrooms were usable because the third bedroom was small and used as a closet. The children stayed at the home three to four nights a week. D.C. testified that they occasionally stayed at the surrogate mother’s house but “have no regular schedule” and will “be there sometimes four days straight and then they might not be there for two days.” The surrogate mother testified that it was not her expectation that D.C. and the children would ever permanently stay with her, stating that she suffers from “many physical ailments” and is “too old and sick to take on the massive responsibility of having [Plaintiffs] stay with [her] permanently.”

Although D.C. and the surrogate mother considered the home to be the property of the surrogate mother, through a series of real estate transactions, D.C. and the surrogate mother became joint owners of the residence and, therefore, possessed a mutual right to use and enjoy the property.

Because it appeared from these circumstances that the children had established residency outside the District, the District informed D.C., that it would no longer continue to enroll the children. Maintaining that his children were homeless and entitled to continue enrollment in the District, D.C. brought suit against the District alleging violations of the McKinney-Vento Homeless Education Assistance Improvements Act of 2001 as enforceable under 42 U.S.C. § 1983.

Ruling on the District’s motion for summary judgment, the United States District Court for the Eastern District of Pennsylvania concluded that the District’s determination that the children resided outside its attendance zone was correct. Consequently, the court granted judgment in favor of the District and dismissed D.C.’s suit.

DISCUSSION

The McKinney-Vento Act was passed in 1987 “to provide urgently needed assistance to protect and improve the lives and safety of the homeless.” The

purpose of the Act is to “ensure that each child of a homeless individual and each homeless youth has equal access to the same free, appropriate public education, including a public preschool education, as provided to other children and youths.” The Act defines the term “homeless children and youths” to include “individuals who lack a fixed, regular, and adequate nighttime residence” and “children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason.” Under the Act, school districts are required to continue a homeless child’s education in the child’s school of origin for the duration of homelessness or enroll the child in any public school that non-homeless students who live in the attendance area in which the homeless child is living are eligible to attend.

In this matter, the court determined that, although the children variously stayed with the surrogate mother at her home and with the father at several other properties, the children did not “lack a fixed, regular, and adequate nighttime residence.” The court concluded that they were not lacking a residence because their father was a joint owner of the surrogate mother’s house and, therefore, had the legal right to possess and use the home.

Also, the court ruled that the children were not “sharing the housing of other persons” within the meaning of the Act. Their father had a joint ownership interest in the surrogate mother’s house. Although their surrogate mother lives there as well, staying in that home does not constitute sharing the home of other persons. The court observed that it would be an “unprecedented expansion of the reach of the Act” to find that the plaintiffs were homeless where they are living in a house jointly owned by their father. Although D.C. testified that he was unwelcome in the home, this testimony did not contradict the fact that he had the legal right to possess and use the home.

Consequently, the court determined that the plaintiffs were not homeless within the meaning of the Act and granted summary judgment in favor of the District.

PRACTICAL ADVICE

Application of the McKinney-Vento Act is highly circumstantial. For the McKinney-Vento protections to apply, it must be demonstrated that a student meets the definition of “homeless,” meaning that the student must lack a “fixed, regular and adequate nighttime residence.” In this case, the facts that the children stayed at a home three or four nights per week and that their father had joint legal ownership interest in that house, weighed against their claim that they were homeless, despite their irregular lodging arrangements. Thus, when presented with an assertion that a student is homeless, school districts can and should investigate the underlying circumstances to confirm the student’s status and entitlement to McKinney-Vento Act protections.



NO “STATE-CREATED DANGER” IN STUDENT-ON-STUDENT SEXUAL ASSAULT AND HARASSMENT CASE WHEN THE SCHOOL DISTRICT TOOK PRECAUTIONS TO AVOID SEXUAL ASSAULTS

Strobel v. Neshannock Township School District, Civil Action No. 15-1089, 2018 U.S. Dist. LEXIS 125037 (W.D. Pa. July 26, 2018). The United States District Court of the Western District of Pennsylvania granted Neshannock Township School District’s motion for summary judgment in a student-on-student sexual assault and harassment case, holding that neither the District nor its administrators violated a student’s constitutional rights by creating a state of danger that resulted in the sexual assault, and were not deliberately indifferent in responding to the student’s complaint of sexual assault and harassment.

BACKGROUND

Sarah Strobel (“Ms. Strobel”) was a high school freshman student at the Neshannock Township School District (“District”) in New Castle, PA. In April 2013, Ms. Strobel, 48 other high-school freshman students, and six chaperones traveled to New York City on a bus for a school-sponsored field trip. On the trip back, Ms. Strobel fell asleep and when she woke up around midnight, she discovered four students touching her vaginal area and buttocks over her pants. The chaperones sat together at the

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front of the bus and occasionally walked up and down the aisle to check on the students.

Ms. Strobel told her mother about the sexual assault when she got off the bus and the mother reported the incident to the District several hours later on April 27, 2013. The District immediately investigated the student's complaint of sexual assault. The District discovered that the chaperones on Ms. Strobel's bus did not know about the sexual assault and Ms. Strobel never told them anything about it. However, based on the District's investigation and informal hearing, three of the students who were involved in the sexual assault were suspended, and the District later signed agreements in lieu of expulsion with these students that prohibited them from having any contact with Ms. Strobel for the rest of the school year. Ms. Strobel requested and received approval for homebound instruction for the remainder of her freshman year.

Prior to Ms. Strobel returning to the high school for her sophomore year, the District made arrangements to limit Ms. Strobel's contact with any of her classmates who were involved in the sexual assault the prior year. For example, Ms. Strobel received preference for lunch period seating, an unrestricted hall pass, unlimited access to guidance and nurse offices, and was allowed to request homebound status at any time.

Despite these arrangements, Ms. Strobel encountered one of the students involved in the sexual assault, Tiara Saado ("Ms. Saado"), three times. These encounters did not involve direct physical or verbal contact between Ms. Stobel and Ms. Saado. The District Senior High School Principal was made aware of these three encounters, investigated each incident but took no action. Ms. Saado apparently also spread rumors about Ms. Strobel, including that Ms. Strobel had lied about the sexual assault, was pregnant, and had sexually transmitted diseases. Near the beginning of Ms. Strobel's junior year, she left the high school for homebound instruction and remained in homebound until she graduated from high school in 2016.

After Ms. Strobel's graduation her parents filed a complaint under 42 U.S.C. § 1983 against six District administrators (the "Chaperones") and the District. The claim against the Chaperones alleged that they violated Ms. Strobel's Fourteenth Amendment right to personal security and bodily integrity by their deliberate indifference to the sexual assault that occurred while they were on the bus with Ms. Strobel; thus creating a danger that culminated in Ms. Strobel's physical and emotional harm. The claim against the District alleged that Ms. Strobel's constitutional rights were violated by the District's failure to train and supervise the Chaperones.

Ms. Strobel's parents also filed a complaint under 20 U.S.C. § 1681 ("Title IX") against the District alleging the District enabled Ms. Strobel's sexual assault and sexual harassment through deliberate indifference. The Chaperones and the District filed a motion for summary judgment on all of Ms. Strobel's claims.

DISCUSSION

The threshold question in any §1983 lawsuit is whether the plaintiff has sufficiently alleged a violation of a constitutional right. The due process clause of the Fourteenth Amendment does not require the state to protect the life, liberty and property of its citizens against invasions by private actors. However, the so-called "state-created danger" exception to this rule applies when a state actor, such as a school district, uses its authority to create a danger for its citizens.

There are four elements to a state-created danger claim: 1) the harm caused was foreseeable and fairly direct; 2) a state actor acted with a degree of culpability that shocks the conscience; 3) a relationship between the state and the plaintiff existed such that the plaintiff was a member of a discrete class of persons subjected to the potential harm brought about by the state's actions; and 4) a state actor affirmatively used its authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

The Court concluded that Ms. Strobel's evidence did not demonstrate the second element of a state-created danger claim (i.e., a degree of culpability that shocks the conscience). In cases where deliberation is possible and school officials have time to make unhurried judgments, "deliberate indifference" is sufficient to shock the conscience. Ms. Strobel's evidence showed that the Chaperones and District had ample time to plan the school trip and implement safety measures. However, the Court concluded that neither the District nor the Chaperones were "deliberately indifferent" to the occurrence of Ms. Strobel's sexual assault.

The Chaperones discussed matters of security and school rules with each other and the students prior to the trip and walked up and down the aisle of the bus during the trip to and from New York City. Despite their periodic walks up and down the aisle, it was undisputed that the Chaperones did not observe the sexual assault. Accordingly, the Court agreed that neither the Chaperones nor the District created a climate of danger that resulted in Ms. Strobel's sexual assault.

Next, Ms. Strobel's Title IX claim against the District focused on the District's actions or inactions after Ms. Strobel's sexual assault occurred. To establish a Title IX claim against a school district based on a school district's response to student-on-student sexual harassment, a plaintiff must show: 1) the school district received federal funds; 2) sexual harassment occurred; 3) the harassment occurred under circumstances wherein the [school district] exercise[d] substantial control over both the harasser and the context in which the...harassment occurred; 4) the [school district] had actual knowledge of the harassment; 5) the [school district] was "deliberately indifferent" to the harassment; and (6) the harassment was so severe, pervasive, and objectively offensive that it [could] be said to [have] deprive[d] the victims of access to the educational opportunities or benefits provided by the school.

The Court noted that "deliberate indifference" in the context of a student-on-student harassment claim under Title IX occurs when a school district's response to the harassment is **clearly unreasonable** in light of known circumstances. Specifically, Title

IX does not require a school district to engage in a particular disciplinary action and courts should defer to school administrators' disciplinary decisions.

Again, the Court stated that Ms. Strobel's evidence did not demonstrate the District was deliberately indifferent to Ms. Saado's harassment against Ms. Strobel. The District developed and implemented a plan to limit personal contact that largely succeeded in limiting contact. The District investigated all of Ms. Strobel's reported incidents of contact with Ms. Saado. The District's high school principal counseled Ms. Saado against her actions following all but one of the reported incidents, and, to the District's knowledge, none of Ms. Strobel's reported incidents involved direct physical or verbal contact. Accordingly, the Court concluded that the District was not deliberately indifferent to Ms. Strobel's post-assault harassment.

Finally, the Court granted the District's motion for summary judgment on Ms. Strobel's §1983 claim for failure to train and supervise the Chaperones because, as noted above, Ms. Strobel's evidence did not show that the District violated Ms. Strobel's constitutional rights by creating a climate of danger on Ms. Strobel's bus ride from New York City to New Castle, PA that resulted in her sexual assault.

PRACTICAL ADVICE:

Plans for a school-sponsored field trip should include reviewing relevant safety and security policies with administrators and students prior to the field trip. A school district's reasonable efforts to protect its students from sexual assaults, even if unsuccessful, will avoid a court from concluding that the school district created a climate of danger for its students that could culminate in a sexual assault against a student.

If a student reports a sexual assault it is vital for the school district to investigate and address the student's complaint. *Strobel v. Neshannock Twp. Sch. Dist.*, shows that a court will likely defer to school administrators' disciplinary decisions following a reported sexual assault when these decisions and actions are reasonable under circumstances known to the school district.

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