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KINDERGARTEN STUDENTS SUBJECT TO COMPULSORY ATTENDANCE REQUIREMENTS UPON ENROLLMENT

Commonwealth v. Kerstetter, 62 A.3d 1065 (Pa. Commw. 2013) (Decided February 19, 2013). The Commonwealth Court held that once a child has enrolled in public school, that child is subject to the compulsory attendance requirements contained in the School Code.

SUMMARY AND FACTUAL BACKGROUND

After obtaining custody of her twin daughters, Jennifer Ann Kerstetter enrolled them in the kindergarten program at the West Beaver Elementary School in the Midd-West School District in Snyder County, Pennsylvania for the 2011-2012 school year.

As a result of the repeated absences of both children during November and December of 2011, the School District filed three citations against Kerstetter alleging that she had violated Pennsylvania's compulsory school attendance law. The magisterial district judge found Kerstetter guilty on all three citations and Kerstetter filed a summary appeal to the trial court. At the hearings conducted by the trial court, Kerstetter testified that she had trouble getting the children out of bed each morning to attend school. She also claimed that under the regulations of the Pennsylvania Department of Education ("PDE"), students enrolled in kindergarten are not of "compulsory school age" and therefore not subject to compulsory attendance requirements.

The Commonwealth of Pennsylvania, which prosecuted the case on behalf of the School District, relied upon the statutory definition of "compulsory school age" contained in the Pennsylvania School Code ("the School Code") and argued that a child is subject to compulsory school attendance laws as soon as that child is enrolled in public school, including enrollment in kindergarten.

The trial court agreed with the Commonwealth's argument, pointing out that giving parents discretion as to when their child would attend kindergarten "would essentially turn our public schools into a free child care situation." The court also reasoned that school districts would be unable to budget for materials, staff or meals if the district had no idea how many kindergarten students might appear on any given day.

After the trial court held that Kerstetter's children were subject to the Code's compulsory school attendance provisions, Kerstetter appealed to the Commonwealth Court.

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DISCUSSION

The Commonwealth Court limited the appeal to the single issue of whether a child is considered of "compulsory school age" in Pennsylvania "if the child is younger than eight years old and currently enrolled in kindergarten courses in public school."

The Court first reviewed Section 1326 of the School Code which was relied upon by the Commonwealth in its case before the trial court. Section 1326 defines "compulsory school age" as "the period of a child's life from the time the child's parents elect to have the child enter school, which shall not be later than at the age of eight (8) years, until the age of seventeen (17) years."

Conversely, Kerstetter based her argument on the PDE regulation found at 22 Pa. Code § 11.13, which defines "compulsory school age" as

> [T]he period of a child's life from the time the child enters school as a beginner which may be no later than at the age of 8 years, until the age of 17 or graduation from a high school, whichever occurs first. A beginner is a child who enters a school district's lowest elementary school grade that is above kindergarten.

Based on this PDE regulation, Kerstetter argued that the law only compels attendance for "beginners" and not kindergarten students.

The Court recognized the ambiguity created by the PDE regulation cited by Kerstetter, particularly with respect to its reference to "beginners." The Court noted that the School Code also contains a reference to "beginners" – but only in the context of admission of beginners to public schools and not with respect to attendance.

Notwithstanding the ambiguity between the regulation and the School Code, the Court determined that the definition of "compulsory school age" contained in Section 1326 of the School Code was the controlling authority and was not ambiguous in and of itself.

Accordingly, the Court held that Kerstetter's children were of compulsory school age upon their enrollment in kindergarten and were therefore subject to the compulsory school attendance law.

PRACTICAL ADVICE

The decision of the Commonwealth Court clarifies an issue made murky by an ambiguous regulation adopted by the Pennsylvania Department of Education. It is now clear that once a child has enrolled in kindergarten in a public school, that child is subject to the compulsory attendance laws contained in the School Code.

CONSTITUTIONAL CHALLENGE TO STUDENT DRUG TESTING POLICY DENIED

Fagnano v. Loyalsock Township School District, SLIE Vol. 50, No. 3 (Court of Common Pleas of Lycoming County, 2013). A school district's random drug testing policy applicable to students with parking permits and participating in extra-curricular activities was held to have satisfied the requirements of the Pennsylvania constitution.

SUMMARY AND FACTUAL BACKGROUND

In February 2011, the Loyalsock Township School District adopted a policy providing for the random and suspicionless testing of students as a condition to participation in extra-curricular activities or to obtain a school parking permit. As justification for the testing

program, the policy cited examples of documented prior drug and alcohol incidents, the longitudinal results of a biannual survey of school district students in grades 6, 8, 10 and 12 regarding drug and alcohol usage and anecdotal evidence of drug/alcohol-related abuse among students. The policy was the result of a year-long study of drug and alcohol abuse among students, multiple committee meetings involving school directors, administrators, students and parents, the review of the student drug-testing programs at other school districts and several public meetings.

Subsequently, a student who historically had participated in extracurricular activities sought to continue his participation, but refused to consent to the drug testing program. As a result, the student was removed from those activities and was denied induction into the National Honor Society. The student initiated an action contesting the constitutionality of the drug testing policy based upon the Pennsylvania Supreme Court's decision in Theodore v. Delaware Valley. In April 2012, the court issued a preliminary injunction that prohibited the enforcement of the policy against the plaintiff. When the injunction was issued, the District voluntarily suspended the policy as to all students pending the outcome of the student's constitutional challenge.

Following a non-jury trial, the court issued a verdict in favor of the school district. The court determined that the policy met the standards set forth in Theodore by demonstrating a specific need for the policy and that the students targeted were likely part of the school district's existing drug problem.

DISCUSSION

In Vernonia School District 47J v. Acton, 515 U.S. 646 (1995), the United States Supreme Court held that suspicionless drug testing of student-athletes was constitutional under the Fourth Amendment. Subsequently, in Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002), the United States Supreme Court upheld as constitutional a school district policy requiring urinalysis drug testing of students involved in any type of extracurricular activity on the grounds that such testing furthered the school district's significant interest in preventing and deterring drug use.

However, in Theodore v. Delaware Valley School District, 836 A.2d 75 (Pa. 2003), the Pennsylvania Supreme Court observed that, although Article I, Section 8 of the state constitution is similar in phraseology to that of the Fourth Amendment of the United States Constitution, the state constitution provides greater protection since the core of its exclusionary rule is grounded in the protection of privacy while the federal exclusionary rule is grounded in deterring police misconduct. In this context, the Court held that a randomized drug testing program will "pass constitutional scrutiny *only* if the District makes some *actual showing of the specific need* for the policy and an *explanation* of its basis for believing that the policy would address that need."

Following the Theodore decision, the attempts of several school districts to enact randomized drug-testing policies were invalidated by Pennsylvania trial courts. In M.T. v. Panther Valley School District (Court of Common Pleas of Carbon County, May 5, 2011), the court concluded that the school district did not demonstrate any identifiable need to test the students targeted by the policy. In particular, the court critically observed that the school district did not adduce evidence or specific historical data to show that students participating in extra-curricular activities or athletics were more likely to use drugs than the general student population or to show that the policy would provide an effective deterrent of student drug usage.

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A similar challenge to a student drug testing policy was granted by the court in M.K. v. Delaware Valley School District (Court of Common Pleas of Pike County, July 21, 2011). While the school district submitted a diagnostic study regarding student attitudes about drug use and anecdotal information of drug usage by students to demonstrate a drug problem, the court noted that such data did not indicate any special risk to or higher degree of usage by students participating in athletics or extra-curricular. The court also concluded that the school district failed to demonstrate that the testing policy was an effective means of deterring drug use. Consequently, the court held that the school district had failed to substantiate the need for and efficacy of the policy as required by the Theodore decision.

The court decision in Loyalsock Township School District is a departure from the trend of invalidation of student drug testing policies. Significantly, the court accepted the school district's evidence that the targeted students are likely to be part of the drug problem that existed as reasonable proof that the policy addressed the problem.

PRACTICAL ADVICE

The United States Supreme Court decisions in Vernonia and Earls rest upon an interpretation of the Fourth Amendment of the United States Constitution. The Theodore decision, however, involves the more protective Pennsylvania Constitution. Consequently, notwithstanding the federal court's decisions, the legality of student drug testing policies in Pennsylvania school districts depend upon meeting the standards established by the Pennsylvania Supreme Court in Theodore.

A school district that desires to adopt a randomized drug testing policy for students participating in extra-curricular activities and/or athletics, must be prepared to demonstrate a specific need for the policy and the efficacy or reasonableness of the policy in addressing that specific need. Circumstances that may be relevant to meeting this standard may include the following:

- *Whether or not the school district can demonstrate the existence and/or pervasiveness of drug and alcohol abuse among students in general and among particular student groups targeted for drug testing.* In this regard, The Theodore court noted as significant that the school district in the Vernonia case adduced evidence that the student-athletes encompassed by the drug testing policy were the leaders of the student drug culture on its campus. The lack of such information was fatal to the attempted defense of the drug testing policies in the Panther Valley and Delaware Valley decisions.

- *Whether or not the student groups to be tested are engaged in activities that expose them to physical risks.* The Pennsylvania Supreme Court observed that such circumstances arguably are presented to student-athletes and students with driving/parking privileges. The potential testing of other extracurricular participants may require proof that such students are among those involved in drug or alcohol abuse.

- *Whether or not the drug testing protocol is reasonable.* All of the cases (Vernonia, Earls and Theodore) approvingly emphasize that the testing policy provided for the collection of samples by trained medical personnel, afforded privacy and confidentiality, resulted in strictly controlled and limited dissemination of testing results and led only to suspensions of privileges of participation in the activities as opposed to criminal or disciplinary consequences.

- *Whether or not the drug testing policy is a reasonable means of addressing the identified need for the policy.* Implementation of the drug testing policies in Panther Valley and Delaware Valley was enjoined in

part because of the school districts' failure to adduce studies, statistics or other evidence that such policies have deterred or would likely deter drug use among the targeted students. In contrast, the court in Loyalsock Township found survey data, anecdotal testimony and documentation of drug/alcohol incidents among students as sufficient to meet this standard.

THIRD CIRCUIT AFFIRMS STUDENTS' RIGHT TO WEAR "I (HEART) BOOBIES!" BRACELETS

B.H. v. Easton Area Sch. Dist., 2013 U.S. App. LEXIS 16087 (3d Cir. 2013). Third Circuit affirms District Court's decision to overturn the school district's ban on "I [heart] Boobies!" bracelets worn by two middle-school students because the bracelets were not lewd, vulgar or likely to cause a material and substantial disruption.

SUMMARY AND FACTUAL BACKGROUND

Two middle-school students ("Students") purchased bracelets bearing the slogan "I [heart] boobies! (KEEP A BREAST)" as part of a nationally recognized breast-cancer-awareness campaign. The Easton Area School District ("District") banned the bracelets, relying on its authority under Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986), to restrict vulgar, lewd, profane, or plainly offensive speech, and its authority under Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), to restrict speech that is reasonably expected to substantially disrupt the school.

The Students filed a motion for preliminary injunction seeking to enjoin the District from enforcing its ban on the bracelets. The District Court held that the ban violated the students' rights to free speech and issued a preliminary injunction against the ban. On August 6, 2013, the Court of Appeals for the Third Circuit upheld the injunction.

DISCUSSION

Generally, a school district may restrict school speech that threatens a specific and substantial disruption to the school environment or that invades the rights of others. See Tinker.

In Easton, the Third Circuit affirmed the District Court's finding that the District had not presented enough evidence that the bracelets were likely to disrupt school operations. Prior to the ban, the bracelets had been worn by students for two weeks and there was no evidence of disruption or misbehavior related to the bracelets. Accordingly, the Court found that the ban was not justified under the "substantial disruption" standard set forth in Tinker.

However, that is not the end of the inquiry because the Supreme Court has identified "narrow" exceptions to the substantial disruption standard. In Fraser, the Court held that the government may categorically restrict vulgar, lewd, profane, or plainly offensive speech in schools, even if it would not be obscene outside of school. Fraser, 478 U.S. at 683, 685. In Morse v. Frederick, 551 U.S. 393, 127 S. Ct. 2618, 168 L. Ed. 2d 290 (2007), the concurring opinion of Justice Alito held that a school district may likewise restrict speech that "a reasonable observer would interpret as advocating illegal drug use" and that cannot "plausibly be interpreted as commenting on any political or social issue." Morse, 551 U.S. at 422 (Alito, J., concurring).

In Easton, the Third Circuit concluded that the Alito concurrence in Morse modified the "lewd speech" exception set forth in Fraser and created the following framework for lewd speech in schools:

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1) plainly lewd speech, which offends for the same reasons obscenity offends, may be categorically restricted regardless of whether it comments on political or social issues,

2) speech that does not rise to the level of plainly lewd but that a reasonable observer could interpret as lewd may be categorically restricted as long as it cannot plausibly be interpreted as commenting on political or social issues, and

3) speech that does not rise to the level of plainly lewd and that could plausibly be interpreted as commenting on political or social issues may not be categorically restricted.

With respect to distinguishing between plainly lewd speech and ambiguously lewd speech, the Third Circuit suggested that elaborate, graphic, and explicit sexual drawings, metaphors and words, including George Carlin's infamous "seven dirty words" are plainly lewd. All other determinations would be made on a case-by-case basis.

The Third Circuit concluded that the bracelets at issue were not plainly lewd and, therefore, because they commented on a social issue (breast cancer awareness), they could not be categorically banned by the District.

PRACTICAL ADVICE

School administrators must make difficult decisions about when to place restrictions on speech in our public schools. The Third Circuit recognized this, but concluded that requiring tough calls was better than suppressing speech of genuine social value. School districts must address student free speech restrictions on a case-by-case basis, first looking into whether the speech is or is likely to cause disruption. If there is no disruption, school districts must examine whether the speech is lewd and whether it is commenting on a political or social issue. Due to the constitutional implications and the fact-based nature of these analyses, it is strongly recommended that school districts discuss any proposed restrictions on student speech with their solicitor before restricting any questionable speech or disciplining any students.

RIGHT-TO-KNOW LAW UPDATE

The following is a collection of recent decisions by Pennsylvania courts and the Pennsylvania Office of Open Records (OOR), interpreting the provisions of Pennsylvania's Right-to-Know Law (RTKL), 65 P.S. § 67.101, et seq.

APPEAL PROCEDURE

- An agency receiving a RTKL request may raise new reasons for denial on appeal. Senate v. Levy, 65 A.3d 361 (Pa. 2013). In Levy, an agency did not raise attorney work-product protection in its initial written denial of a RTKL request. The Pennsylvania Supreme Court overturned existing precedent and held that the agency could raise this new issue on appeal.

- When a governmental agency does not respond to a right-to-know request, resulting in a "deemed denial," the agency may nonetheless raise exceptions under the RTKL as defenses in an appeal hearing before the OOR. McClintock v. Coatsville Area School District, 2013 Pa. Commw. LEXIS 320 (Pa. Commw. Ct. August 9, 2013).

- On an appeal to the OOR, the agency must submit detailed affidavits making clear that the agency searched for records but none were found, and clearly explaining why records are exempt from disclosure under the RTKL. Office of Governor v. Scolforo, 65 A.3d 1095 (Pa. Commw. Ct. 2013).

- An affidavit must not state that all "public records responsive to the RTKL request have been provided," because whether a record is a "public record" is a question of law. Instead, the affidavit should state that "all records responsive to the request have been provided." Duquette v. Palmyra Area School District, 2013-0599 (OOR May 9, 2013).

RESPONSE PROCEDURE

- Any writing to an agency including a request for records is a request under the RTKL. A requestor does not have to comply with agency policy that the request be addressed to the open records officer, or be included on a standard agency form. Commonwealth v. Office of Open Records, 48 A.3d 503 (Pa. Commw. Ct. 2012). This case has been appealed to the Pennsylvania Supreme Court, but it is not certain that the Supreme Court will hear the case.

- Response times under the RTKL are calculated from the date the agency's open records officer receives the request, even if the request is originally sent to another employee at an earlier date. Commonwealth Office of the Governor v. Donahue, 59 A.3d 1165 (Pa. Commw. Ct. 2013).

SPECIFICITY OF REQUEST

- An agency may not deny a request on the basis of insufficient specificity under the theory that the agency does not have a systematic way to search for the records. An agency's failure to maintain its files in a way necessary to meet its obligations under the RTKL should not be held against the requestor. Dept. of Envtl. Prot. v. Legere, 50 A.3d 260 (Pa. Commw. Ct. 2012).

- A request is insufficiently specific where it is overly broad as to the documents sought, open-ended as to timeframe, and requires the agency to perform legal research and make a judgment about whether particular records are responsive. Askew v. Pa. Office of the Governor, 65 A.3d 989 (Pa. Commw. Ct. 2013).

- A request was deemed insufficiently specific when it sought e-mails to and from four separate mail domains containing any of 14 search terms, some of which were broad. The request did not specify a timeframe, specific employees or specific agency departments. Montgomery County v. Iverson, 50 A.3d 281 (Pa. Commw. Ct. 2012).

EMPLOYEE PERSONAL INFORMATION

- An employee's personal cellular or landline telephone number, provided by a government agency for work purposes, is exempt from disclosure under the personally identifiable information exception to the RTKL. Office of the Governor v. Raffle, 65 A.3d 1105 (Pa. Commw. Ct. 2013).

- E-mail addresses provided by the agency and used by individual agency employees are not required to be disclosed under the personally identifiable information exception. Office of Lt. Gov. v. Mohn, 67 A.3d 123 (Pa. Commw. Ct. 2013).

- An employee or official's personal calendar entries are not public records as a matter of law, and may come within the pre-decisional deliberative exception to the RTKL. Office of Governor v. Scolforo, 65 A.3d 1095 (Pa. Commw. Ct. 2013).

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- School districts are currently enjoined from providing employee home addresses to RTKL requestors. However, the Pennsylvania Supreme Court is currently re-considering this injunction in light of Mohn, Raffle, and the Supreme Court's own affirming decision (in the context of candidate nomination forms) that there is no right to privacy in one's home address. Marin v. Sec'y of Pa., 41 A.3d 913 (Pa. Commw. Ct. 2012); aff'd at 66 A.3d 250 (Pa. 2013).

DISRUPTIVE REQUESTS

- An agency must meet specific criteria in order to deny a request on the basis that it is disruptive. In order to show that a request is disruptive under the RTKL, the agency must prove 1) that the requestor has made previous requests for the same record, and 2) that the repeated requests are unreasonably burdensome. 65 P.S. § 67.506(a). In S.G. v. Chambersburg Area School District, 2013-0455 (OOR April 15, 2013), the school district objected to a request by a minor student on the basis that the request was disruptive. The school district argued the student was acting as a proxy for her father, who had made a similar request previously. Nineteen similar requests had been made by multiple individuals. The OOR denied the appeal by the agency, holding that 1) the student had made no previous requests and 2) the fact that others had made similar requests in the past did not make the request unreasonably burdensome.

GOVERNMENT CONTRACTORS

- A private contractor of a government agency must only provide records that directly relate to its governmental function. The contractor is not required to provide its personnel files, when these records do not sufficiently relate to the performance of the government function. Allegheny County Department of Administrative Services v. Parsons, 61 A.3d 336 (Pa. Commw. Ct. 2013).

FORMER EMPLOYEES

- The RTKL does not require agencies to seek responsive records from former employees or public officials. Breslin v. Dickinson Township, 68 A.3d 49 (Pa. Commw. Ct. 2013).

JURISDICTION

- Documents received by the Pennsylvania Secretary of Education in his statutorily-defined role as a board member of the Pennsylvania State University (PSU), are records for the purposes of the RTKL even though PSU is not a state agency. Bagwell v. Pa. Dep't of Educ., 2013 Pa. Commw. LEXIS 267 (Pa. Commw. Ct., July 19, 2013).

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