TUCKER | ARENSBERG Attorneys

EDUCATION LAW REPORT

Published in cooperation with the University of Pittsburgh's Tri-State Area School Study Council

Fall 2024 Edition

In This Issue

Tucker Arensberg, P.C.

One PPG Place
Suite 1500
Pittsburgh, PA 15222
412.566.1212

300 Corporate Center Drive, Suite 200
Camp Hill, PA 17011
717.234.4121

tuckerlaw.com

COMMONWEALTH COURT RULES THAT A SCHOOL DISTRICT FAILED TO CONDUCT A PROPER HEARING TO TERMINATE A TENURED TEACHER

Follman v. School District of Philadelphia, 320 A.3d 882 (Pa. Cmwlth. 2024) (A tenured teacher who was terminated by a school district was reinstated since the termination hearing was held without a single board member present, thereby violating the teacher's rights to a hearing under the School Code.)

BACKGROUND

At the onset of the COVID-19 pandemic, Neal Follman ("Follman") was working as a tenured teacher at the School District of Philadelphia ("District"). As part of the District's efforts to safely reopen after the pandemic, the District notified its staff that all employees and students would be tested for COVID-19 every week. The District indicated that these tests would be mandatory absent a medical exemption.

Follman refused to submit to weekly testing on various grounds, including that the District was not his "medical provider," that his medical information was private, and his mistrust of the company engaged by the District to administer the tests. The District found that there was insufficient cause for Follman's refusal and informed him that his conduct constituted an "Unsatisfactory Incident." A preliminary investigation ensued, and a hearing officer ultimately recommended that the District terminate Follman's employment.

Subsequently, the District mailed Follman a Statement of Charges and Notice of Right to Hearing, which set forth a date and time for a hearing where Follman could appear and contest the recommendation. Follman did appear and testified as to the numerous reasons for his refusal. The hearing was virtual and was conducted entirely by an appointed hearing officer, without a single board member present. Thereafter, the District unanimously voted to terminate Follman's employment. Follman then appealed the District's decision to the Secretary of Education ("Secretary"), who affirmed the dismissal.

DISCUSSION

The Court began its analysis by explaining the different procedural protections afforded to professional employees, temporary professional employees, and nonprofessional employees in the School Code. Professional employees — like Follman — are afforded the greatest protection. Prior to the termination of a professional employee, the District must hold a hearing where the individual "will be given an opportunity to be heard… before the board of school directors." 24 P.S. § 11-1127. All testimony at such hearings "shall be taken under oath, and any member of the board of school directors shall have power to administer oaths to such witnesses." 24 P.S. § 11-1128. By

continued

contrast, however, temporary professional employees are not afforded a right to a hearing under the School Code. Further, nonprofessional employees may receive a hearing if demanded; otherwise, however, a school district is empowered to dismiss them for several enumerated grounds "after due notice, giving the reasons therefor." 24 P.S. § 5-514.

The Court was able to distinguish the case law cited by the District. For example, the District argued, based on the decision in *Lewis v. School District of Philadelphia*, 690 A.2d 814 (Pa. Cmwlth. 1997), that it was permitted to delegate Follman's termination hearing to an appointed hearing officer. *Lewis*, however, involved the termination of a nonprofessional employee rather than a tenured professional employee like Follman. Further, while Pennsylvania courts have previously held that a termination hearing for a professional employee may be conducted without all board members present, those cases were found to be distinguishable since, in each case, a majority of board members were present for the hearing. In Follman's case, not one board member attended the hearing.

The Court concluded that the plain and unambiguous language of the School Code provided professional employees with a right to a termination hearing with board members present. The Court expressed, however, that it was not deciding the issue of whether such a hearing would be valid "with some members of a school board, yet less than a quorum, present." Ultimately, Follman's employment was reinstated, and the Secretary was directed to calculate the appropriate amount of back pay owed to Follman, minus his obligation to mitigate damages.

PRACTICAL ADVICE

The ruling in *Follman* makes clear that professional employees are guaranteed the right to a termination hearing with board members present under the School Code. The Court did not hold that a school district was prohibited from appointing a hearing officer to conduct such a hearing; however, some amount of board members are required to be present. The case law examined by the Court suggests that a quorum of board members must be present. Note, however, that the Court did not rule on the issue of whether a termination hearing would be valid with less than a majority of board members present.

The *Follman* opinion also highlights the different procedural requirements for the termination of professional employees, temporary professional employees, and nonprofessional employees under the School Code. When terminating an employee, school districts need to be keenly aware of the employee's category and the correct procedure that must be followed. In particular, school districts should exercise great care in the termination of professional employees, who are granted significantly more protections than the other categories.

SCHOOL DID NOT ACT WITH DELIBERATE INDIFFERENCE WHEN INVESTIGATING SEXUAL ASSAULT

McAvoy v. Dickinson College., 115 F.4th 220 (3d Cir. 2024). Third Circuit holds that school did not act with deliberate indifference under Title IX because the school issued a no-contact directive and remained flexible and accommodating for the student's needs.

BACKGROUND

McAvoy, a former student at Dickinson College, alleged that she was sexually assaulted by another student, TS, in 2017. Initially, she reported the incident to a professor and the professor reported the assault to the colleges Title IX office the following day. McAvoy met with Dickinson's Title IX Coordinator a week later but did not disclose TS's name and was not sure if she wanted to proceed with a Title IX incident. A month later, McAvoy met with the Title IX Coordinator again, disclosed TS's name, and requested a formal investigation into the assault. McAvoy also requested that a no-contact accommodation be issued during the investigation.

A few days later, Dickinson issued a notice of the commencement of the investigation to McAvoy and TS, setting forth an anticipated 60-day timeline and imposing a no-contact directive to McAvoy and TS. Dickinson's response was not perfect. The investigation took longer than the 60-day target for resolution, but the college failed to provide written notice of the extension or the reason for the extension. In addition, the no-contact order was not uniformly followed, and TS and McAvoy were assigned to the same housing unit while the investigation was pending.

The investigators issued a 40-page report, nearly five months after McAvoy requested an investigation, that concluded that TS had sexually assaulted McAvoy. Dickinson imposed a semester of probation on TS and rescinded the no-contact directive. Both parties appealed, but the decision was affirmed. Rather than be on probation, TS departed the college and did not return. McAvoy remained at Dickinson and graduated in 2020.

McAvoy sued Dickinson challenging its response to her assault. She asserted two claims based on Title IX: 1) hostile environment due to deliberate indifference to sexual assault in violation of Title IX: 2) gender discrimination due to deliberate indifference to sexual assault in violation of Title IX.

DISCUSSION

Title IX provides, *inter alia*, that no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The Supreme Court has determined that Title IX contains an implied private right of action accompanied by the availability of monetary damages. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998).

The Supreme Court recognized in *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, 526 U.S. 629, 633 (1999), that such an implied private damages action may be employed to hold educational institutions accountable for student-on-student harassment, but set a high bar in these cases: "funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."

In *Davis*, the Court recognized that schools should not be tasked with purging all peer harassment, and that courts should not be tasked with second-guessing the disciplinary decisions of school administrators. *Id*. at 648. To those ends, the Court held that deliberate indifference occurs only where the Title IX recipient's response "is clearly unreasonable in light of the known circumstances." *Id*.

In *McAvoy*, the Court concluded that Dickinson's response was not clearly unreasonable in light of the known circumstances and held that McAvoy's claims that Dickinson acted with deliberate indifference failed as a matter of law. Initially, the Court rejected McAvoy's argument that the length of the investigation (which took three time longer than the proposed 60-day timeframe) demonstrated deliberate indifference because, while a delayed response may constitute deliberate indifference if the delay reflects an intentional effort to sabotage the orderly resolution of the complaint, there was no evidence of any impermissible motivation on Dickinson's part.

The Court also rejected McAvoy's arguments that Dickinson was obligated to do more to protect her. First, while the Court acknowledged that Dickson assigned TS and McAvoy to the same housing unit while the investigation was pending, there was no evidence that this decision was the result of anything more than negligence on Dickinson's part. In addition, the Court rejected McAvoy's claim that Dickinson was required to act on its own initiative even when McAvoy did not request any accommodations. The Court noted that McAvoy was a young adult while at Dickinson and that the school properly took her views into account. Moreover, the fact that Dickinson's actions were sometimes ineffective did not change the result because ineffective responses are not necessarily clearly unreasonable.

Finally, the Court rejected McAvoy's argument that Dickinson's actions evidenced an attempt by the school to minimize her assault. The Court explained that, under certain circumstances, a school's motivation to minimize an incident may provide evidence of deliberate indifference. For example, attempts to "sweep reports of sexual assault under the rug" by dissuading a victim from taking legal action could amount to deliberate indifference. In this case however,

continued

Dickinson provided McAvoy both mental health and academic support, responded to her affirmative requests for accommodations, expended significant resources in conducting a thorough investigation of the assault, and did not attempt to dissuade her from pursuing Title IX relief.

Accordingly, the Third Circuit ruled in favor of Dickinson.

PRACTICAL ADVICE

McAvoy demonstrates that a prompt and effective response to a report of sex discrimination or sex-based harassment will protect a school from civil actions alleging deliberate indifference. In this case, the school, while it made a few mistakes, provided McAvoy with support and resources and conducted an in-depth investigation, ultimately ending with the imposition of sanctions on TS. All schools should work with their solicitors to ensure that they have proper procedures and processes in place to address reports of sex discrimination promptly and effectively.

CYBER TEACHER LOSES CERTIFICATE FOR RELATIONSHIP WITH SEX OFFENDER

S.E.N. v. Department of Education (Professional Standards and Practices Commission)., 651 C.D. 2023 (Pa. Commw. Ct., August 28, 2024). The Pennsylvania Department of Education revoked the teaching certificate of a teacher who was in a romantic relationship with a convicted sexually violent predator and knowingly allowed this person to reside with the teacher and her minor daughter. The Pennsylvania Commonwealth Court upheld the revocation of the teaching certificate, rejecting the teacher's argument that she should not be suspended because she did not directly commit any act of child abuse, and therefore was not a direct threat to students.

BACKGROUND

A teacher ("Teacher") within Titusville Area School District ("District") was criminally charged with endangering the welfare of children, a crime disqualifying a teacher for employment under the Pennsylvania Public School Code, 24 P.S. § 111(e)(1). Following this charge, the Pennsylvania Department of Education Professional Standards and Practices Commission ("Commission") revoked Teacher's teaching certificate. Teacher requested an appeal hearing before the Commission and at the hearing the teacher acknowledged the facts underlying the criminal charges against her: that she 1) knowingly entered a romantic relationship with a convicted sexually violent predator, 2) allowed that predator to reside in the teacher's home with the teacher's minor daughter, and 3) the sexually violent predator was subsequently charged with indecent contact toward Teacher's minor daughter.

Due to her indictment, Pennsylvania's Educator Discipline Act (the "Act") required the Commission to suspend Teacher's teaching certificate if the Commission "determines the educator poses a threat to the health, safety, or welfare of students or other persons in the schools of this Commonwealth." 24 P.S. § 2070.9b(a)(1).

Teacher denied she posed "a threat to the health, safety, or welfare of students or other persons in the schools of this Commonwealth." She presented testimony from District officials that she primarily taught online classes in the District's cyber education program and had limited contact with children. A District employee also testified the District developed a safety plan while charges were pending against Teacher to supervise her when she was in proximity to students. In lieu of suspending her license, Teacher offered the Commission an affidavit under the Act stating that during the pendency of the criminal proceeding, Teacher would not be employed in a position involving direct contact with children or students. In response the Department pointed out the Act did not allow the Commission to accept such an affidavit when the criminal allegations against Teacher involve sexual misconduct, sexual abuse, or exploitation of a child. 24 P.S. § 2070.9b(a)(1)(ii).

The Commission did not accept the affidavit offered by Teacher and ruled she did pose a threat to the health, safety and welfare of students.

DISCUSSION

Teacher appealed the Commission's decision to the Pennsylvania Commonwealth Court, which upheld the Commission's decision. Teacher argued there was not a causal connection, or nexus, between her domestic situation and the welfare of her students.

The Commonwealth Court held a teaching license can be suspended even without a direct nexus between the criminal charges and the welfare of students. The Court explained a teacher may be suspended if allegations against the teacher suggest either 1) the teacher is a direct threat to the health, safety, or welfare of students or 2) the teacher does not possess the "discernment to protect the health, safety, or welfare of students."

The Commonwealth Court explained that by allowing a sexually violent predator to reside in the home with Teacher's minor daughter and by failing to identify the signs of child abuse against her daughter, Teacher demonstrated that she was unable "to recognize and prevent child abuse." Because of this, the Court affirmed the Commission's decision that Teacher posed a threat to the health, safety, or welfare of her students.

The Commonwealth Court also rejected Teacher's allegations that various provisions of the Act violated Teacher's substantive due process rights, her reputational rights under the Pennsylvania Constitution, and her free association and free speech rights under the United States Constitution.

PRACTICAL ADVICE

The Commonwealth Court stated that, in certain circumstances, a teacher's certificate may be revoked even if a teacher is not a direct threat to the health and safety of students. If a teacher demonstrates he or she does not possess the "discernment" to protect a minor child from abuse by another person, the teacher's license may be revoked even though the teacher did not commit the abuse. It is unclear how generally this concept may be applied in the context of teaching certificate suspension proceedings.

COMMONWEALTH COURT UPHOLDS MONETARY THRESHOLDS FOR TAX APPEALS

Coatesville Area School District v. Chester County Board of Assessment Appeals (No. 1313 C.D. 2022 (Pa. Commonwealth Court, August 15, 2024) — Commonwealth Court affirms taxing body thresholds for tax appeals even if appeals against only non-residential properties.

Over the past few years, the Pennsylvania Supreme Court and Commonwealth Court have several times visited the issue of when tax assessment appeals by taxing bodies are proper. In the latest case before the Commonwealth Court in *Coatesville Area School District v. Chester County Board of Assessment Appeals*, the Court upheld a District's facially property-type-neutral monetary threshold in an effort designed to produce the most cost-effective properties for tax appeals. In addition, the Court found that the District did not violate the state constitution's Uniformity Clause even though the District's policy resulted in no appeals of residential properties. Accordingly, the Court affirmed the Common Pleas of Chester County's Order granting the Coatesville Area School District's tax appeal.

BACKGROUND

The Preserve at Mill Town Lantern Owner LLC ("Taxpayer") owned an apartment complex in Chester County. The Coatesville Area School District ("District") initiated a property tax appeal that the Chester County Board of Assessment Appeals ("Board") denied. The District appealed the Board's decision to the Court of Common Pleas of Chester County, asserting the property's approximate $8 million assessed value was too low. At a trial in October 2022, the parties stipulated to the property's fair market and assessed value, which for 2020 were $49,500,000 and $24,403,500, respectively. But the Taxpayer argued that the appeal violated the state's Uniformity Clause in the first place. That Clause holds that "all taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority of levying the tax…" Applied to real estate, the Clause prohibits different subjects of property (like industrial or residential properties) from being taxed differently from each other.

In the trial before Common Pleas Court, evidence showed the District's acting business manager initiated tax appeals under which the District developed a $10,000 monetary threshold, such floor based upon the

continued

cost effectiveness of the appeals. A school district consultant testified that in complying with the $10,000 monetary threshold, 141 properties were identified, but ultimately 16 properties were selected for appeal. The Taxpayer presented an expert who concluded that under the District's methodology, no property would meet the $10,000 threshold, effectively eliminating the potential to appeal single family properties.

The Common Pleas Court opinion found the District's policy parameters were monetarily driven and used to make the litigation process cost effective. The trial court found that no Uniformity Clause violation had occurred because the District's policy directed that all properties, regardless of property type, be considered. Monetary thresholds were permissible so long as, on their face, they did not discriminate based on property type. Also, no evidence existed that the District had identified a residential property for appeal but a commercial property was selected instead.

DISCUSSION

Before Commonwealth Court, the Taxpayer argued that a monetary appeal threshold is per se invalid under the state's Uniformity Clause, asserting that prior Court decisions did not reach a clear consensus on whether any monetary thresholds passed constitutional muster. Also, the Taxpayer argued that the District really never actually performed such a cost benefit analysis and just simply targeted for appeal only high value properties; even if such a cost benefit analysis was permissible, it did not justify discriminatory treatment. Finally, the Taxpayer argued that the District's method of culling the list from 141 properties that met the threshold down to 16 was arbitrary.

In its analysis, Commonwealth Court reviewed legal precedent as to whether school districts have the right to appeal assessments, holding that such appeals can occur within the boundaries of Uniformity Clause of the Constitution. With that principle in mind, the Court turned to prior state Supreme Court precedent that invalidated a school district's tax appeal program which concentrated solely on commercial properties. The *Coatesville* Court, however, rejected the argument that the only recourse available to taxing bodies was to appeal all property tax assessments: prior precedent left open the possibility of other non-discriminatory methods of deciding which properties to appeal.

Further, the Court believed the reasoning in prior cases was that general monetary thresholds represented a balance of revenue generation with non-discriminatory implementation of a taxing system. At its essence, the Court held that the state general assembly had given school districts the power to appeal assessments and that such assessments can occur short of countywide reassessments. For that to mean something, schools must have means of designing neutral policies to create predictability and fairness in the taxing district.

As to whether the District's policy was unconstitutionally implemented, as it ended up targeting only commercial properties, the Court rejected any argument that a policy of not resulting in the appeal of residential properties was evidence of a Uniformity Clause issue. Here Commonwealth Court agreed with Common Pleas Court that there was no evidence presented that under the District policy there was identification of a residential property which met the threshold, but such property was not selected for appeal.

PRACTICAL ADVICE

Commonwealth Court upheld the use of monetary thresholds in determining appeals, even if no residential appeals resulted from an appeal program. However, the parameters of the program have to be clear and the standards followed rigorously to pass judicial scrutiny.

LEGISLATION UPDATE

The General Assembly and Governor Shapiro recently enacted various legislation affecting school entities. The following is a brief summary of those developments.

Act 55 of 2024 requires each school entity (i.e., school districts and vocational-technical schools) to have at

least one full-time school security personnel who has completed the required training on duty during the school day. "School security personnel" are defined to include school police officers, school resource officers, and school security guards. "School day" is defined as the hours between the morning opening of a school building and the afternoon dismissal of students on a day which school is in session. School entities may directly employ or contract for school security personnel. School entities may, but are not required to, assign school security personnel to be on duty during extracurricular activities that are outside the school day.

School entities must certify to the School Safety and Security Committee each year that they have met this requirement or have been issued a waiver for this requirement. Waivers may be granted based on criteria developed by the Pennsylvania Commission on Crime and Delinquency. The criteria for the waiver must include an attestation that the school entity has acted in good faith and meets one of the following:

- Does not have a municipal police department or law enforcement agency that is able to provide a school resource officer.
- Has been unable to hire or contract with a school police officer.
- Has been unable to hire or contract with a school security guard.
- Has been unable to hire or contract with a police officer from an accredited police force.

Applications for waivers are to be submitted to the School Safety and Security Committee for the waiver, and a waiver will expire one year after its approval.

Joint guidance issued by the PA Commission on Crime and Delinquency and the PA Department of Education advises that school entities are **not** required to have school security personnel in place prior to the start of the 2024-2025 school year to meet the requirement but are expected to meet the requirement or apply and receive a waiver during this school year.

Act 67 of 2024 amended Section 1302 of the Public School Code to include provisions for disenrolling a student whenever their parent, guardian, or other person having charge of the child does not reside in the school district and a determination is made that the child is not otherwise entitled to free school privileges. The statute provides that the child may not be disenrolled from the school until:

1) The parents, guardians, or any other person having charge or care of the child are provided an opportunity to appeal the decision through a hearing held pursuant to an appropriate grievance policy of the school district, and any appeal has been exhausted;

2) After the parents, guardians, or any other person having charge or care of the child have been provided notice of such a hearing, the parents, guardians, or other person having charge or care of the child decline to participate in a hearing pursuant to the appropriate grievance policy of the school district or appeals process;

3) After the parents, guardians, or any other person having charge or care of the child have been provided information from the school district's liaison for homeless children and youth regarding the educational rights of homeless students; or

4) A court enters an order directing the child to be disenrolled and enrolled in a different school.

Section 1302.1 of the Public School Code, enacted in 2023, provides that school districts are to enroll students whose parent is an active duty member of the armed forces of the United States prior to establishing residency for purposes upon providing a copy of the official military orders to the school district and proof of the parent or legal guardian's intention to move into the school district. Proof under this subsection may include a signed contract to purchase a home, a signed lease agreement, or a statement from the parent or legal guardian stating their intention to move into the school district. Act 82 of 2024 extends these rights to any student who is required to move due to the parent's responsibilities in the service of the National Guard or Reserve that result in the student having to transfer from a public school in one state to a public school located in Pennsylvania.

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

Daniel C. Conlon
412.594.3951
dconlon@tuckerlaw.com

Irving S. Firman
412.594.5557
ifirman@tuckerlaw.com

Gary J.Gushard
412.594.5537
ggushard@tuckerlaw.com

Kevin L. Hall
717.221.7951
khall@tuckerlaw.com

Mark C. Hamilton
412.594.5558
mhamilton@tuckerlaw.com

John E. Hosa
412.594.5659
jhosa@tuckerlaw.com

Robert L. McTiernan
412.594.5528
rmctiernan@tuckerlaw.com

David J. Mongillo
412.594.5598
dmongillo@tuckerlaw.com

Weston P. Pesillo
412.594.5545
wpesillo@tuckerlaw.com

Thomas P. Peterson
412.594.3914
tpeterson@tuckerlaw.com

Ashley J. Puchalski
412.594.5509
apuchalski@tuckerlaw.com

Gavin A. Robb
412.594.5654
grobb@tuckerlaw.com

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

Christopher Voltz
412.594.5580
cvoltz@tuckerlaw.com

Ashley S. Wagner
412.594.5550
awagner@tuckerlaw.com

Christopher Weis
412.594.5570
cweis@tuckerlaw.com

Frederick J. Wolfe
412.594.5573
fwolfe@tuckerlaw.com

TUCKER ARENSBERG Attorneys
MUNICIPAL AND SCHOOL LAW GROUP

Tucker Arensberg, P.C. One PPG Place, Suite 1500, Pittsburgh, PA 15222 412.566.1212
300 Corporate Center Drive, Suite 200, Camp Hill, PA 17011 717.234.4121

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 and Central Pennsylvania. In addition, our attorneys serve as special labor counsel to numerous school districts and municipalities in Western and Central 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. For more information, please contact us at info@tuckerlaw.com.

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 us at tristate@pitt.edu.