School Law Newsletter

HALLIGAN MAHONEY & WILLIAMS

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Fourth Circuit Issues Guidance on Employee Free Speech in the Age of Social Media

On March 20, 2017, in the case of *Grutzmacher & Buker v. Howard County, et. al*, the Fourth Circuit Court of Appeals issued an opinion analyzing First Amendment free speech issues as they relate to government employees posting on social media accounts. The ruling in this case provides school districts with some clarity regarding employees' free speech rights and the role of social media policies for employees.

By way of background, Kevin Buker, a former firefighter, brought this action alleging, among other things, that Defendant Howard County Fire Department (the "Department") terminated his employment in retaliation for exercising his First Amendment free speech rights. While on duty and in his office, Buker was watching news coverage of a gun control debate when he posted the following statement to his Facebook page:

> *My aide had an outstanding idea . . . let's all kill someone with a liberal . . . then maybe we can get them outlawed too! Think of the satisfaction of beating a liberal to death with another liberal . . . it's almost poetic….*

The Assistant Chief of the Fire Department was informed of Buker's Facebook post and e-mailed Buker, directing him to review his Facebook posts and to remove anything inconsistent with the Department's social media policy. A few hours after removing the posts, Buker posted the following to his Facebook wall:

> *To prevent future butthurt and comply with a directive from my supervisor, a recent post (meant entirely in jest) has been deleted. So has the complaining party. If I offend you, feel free to delete me. Or converse with me. I'm not scared or ashamed of my opinions or political leaning, or religion. I'm happy to discuss any of them with you. If you're not man enough to do so, let me know, so I can delete you. That is all. Semper Fi! Carry On.*

Three weeks later a member of a Department-affiliated volunteer company posted to his own Facebook page a picture of an elderly woman with her middle finger raised. Above the picture, he wrote "for you chief." Overlaid across the picture was the following caption: "THIS PAGE, YEAH THE ONE YOU'RE LOOKING AT IT'S MINE[.] I'LL POST WHATEVER…I WANT." Buker "liked" the photograph. Several days later, Buker was terminated for violating the Department's Code of Conduct and Social Medial Guidelines.

In analyzing Plaintiff's First Amendment retaliation claim, the Fourth Circuit determined that public employees do not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment. On the other hand, the court further held that the judiciary must also consider the government's countervailing interest in controlling the operation of its workplace.

The Fourth Circuit Court of Appeals analyzed Buker's Facebook posts and "likes" and determined that parts of Buker's speech were protected speech because his Facebook posts addressed matters concerning gun control legislation. The Fourth Circuit specifically found that Buker's Facebook "like" was speech;

however, the court weighed the public interest commentary contained in Buker's Facebook post against the Department's dual interest in providing effective and efficient services to the public. Significantly, the court held that a government employer need not prove that the employee's speech actually disrupted efficiency but only that an adverse effect was reasonably expected to occur.

Accordingly, the Fourth Circuit Court of Appeals concluded that although Buker's speech addressed matters of public concern, the Department's interest in workplace efficiency and preventing disruption outweighed the public interest commentary of Buker's Facebook activity.

Although this case involved a county fire department employee, the Fourth Circuit's analysis should provide guidance for public school districts in evaluating and addressing employee use or misuse of social media. Districts should continue to make employees aware that the use of social media may adversely affect their employment when it becomes disruptive to the school environment or impacts their effectiveness.

South Carolina Freedom Of Information Act Amendment

On May 19, 2017, Governor Henry McMaster signed into law several significant changes to the South Carolina Freedom of Information Act ("FOIA"). These changes to the FOIA became effective with the Governor's signature on May 19, so we believe it is essential for school districts to be aware of the changes.

Important new provisions include:

1. Electronic records and transmission of public records. A person has a right to receive an electronic transmission of any public record; however, a public body is not required to create an electronic version of a public record when it does not exist. Further, copy charges may not apply to public records transmitted electronically, but if records are not in electronic format and the public body agrees to produce them in electronic format, the public body may charge for the staff time required to transfer the documents to electronic format.

2. Fees for the search, retrieval, or redaction of public records. A public body may charge reasonable fees, not to exceed the actual cost of the search, retrieval, and redaction of records, in responding to a FOIA request. A public body **must** develop a fee schedule to be posted online. Any fee cannot exceed the prorated annual salary of the lowest paid employee who, in the reasonable discretion of the custodian of the records, has the necessary skills and training to search, retrieve, or redact the records. Additionally, a uniform fee for copying costs may be charged (except for records transmitted electronically) not exceeding the prevailing commercial rate. A fee deposit not exceeding 25% of the total reasonable anticipated cost for production of the records may be required by the public body prior to searching for or making copies of records.

3. New timelines for responding to a FOIA request. Instead of 15 business days, a public body now has only 10 business days to notify the person making the request of its determination as to the public availability of the requested public record. If the FOIA request seeks records more than 24 months old, then the public body has 20 business days to provide this notification. This initial notification and determination of availability, however, is not required to include a final decision or opinion as to whether specific portions of documents may be subject to redaction. Following the initial determination notice, or the receipt of any required fee deposit, whichever is latest, a public body has 30 calendar days (35 calendar days for records more than 24 months old) to actually produce the records responsive to the FOIA request. Finally, these timelines are subject to extension by written, mutual agreement, and such agreement shall not be unreasonably withheld.

4. Prohibition of use of personal information for commercial solicitation. Local governments and political subdivisions, such as school districts, must provide a notice under the Family Privacy Protection Act, §30-2-50, to all persons who request or obtain records pursuant to the Family Privacy Protection Act, that obtaining or using

public records for commercial solicitation directed to any person in South Carolina is prohibited. Further, local governments and political subdivisions must take reasonable measures to ensure that no private person or private entity obtains or distributes personal information obtained from a public record for commercial solicitations. Under the new law, these limitations on the use of public records appear to apply without regard to whether personal information is obtained under the Family Privacy Protection Act or the FOIA.

5. New legal remedies for public bodies and other interested persons and entities. Public bodies now may file a civil action to seek relief from unduly burdensome, overly broad, vague, repetitive, or otherwise improper FOIA requests, or where the public body is unable to make a good faith determination as to whether the information is exempt from disclosure. Likewise, a person or entity with a specific interest in records or information contained in records, which are exempt from disclosure under certain sections of the FOIA (i.e., §30-4-40(a)(1), (2), (4), (5), (9), (14), (15), or (19)) also may file a civil action or intervene in a pending legal action to determine whether the information is exempt from disclosure. Attorney's fees and other costs of litigation may be awarded to a prevailing party in certain cases.

Overall, we believe these new amendments to the FOIA help clarify public bodies' responsibilities and rights in responding to FOIA requests and in practice will not substantively change how the majority of FOIA requests are handled. Nevertheless, it is important for public bodies, like school districts, to be aware of the new timelines, to promptly develop and post online the required fee schedules and to ensure proper notification regarding the prohibition relating to personal information received under the FOIA for commercial solicitation.

Office of Civil Rights Changes Guidance on Transgender Student Complaints

On February 22, 2017, the United States Department of Justice ("DOJ") and the United States Department of Education ("DOE") issued guidance withdrawing and rescinding the statement of policy and guidance reflected in the "*Dear Colleague Letter on Transgender Students*" jointly issued by the Civil Rights Division of the DOJ and the DOE on May 13, 2016, regarding the use of sex-segregated facilities like restrooms or locker rooms.

In its February 2017 guidance, the Departments opined that the interpretation of the former May 2016 guidance had given rise to significant litigation regarding school restrooms and locker rooms. Under these circumstances, the Departments decided to withdraw and rescind the May 2016 guidance in order to further and more completely consider the legal issues involved. Both will no longer rely on the views expressed within that guidance. The Departments have also advised that they will pursue discrimination (including sex discrimination), bullying, and/or harassment claims pursuant to Title IX and other federal laws to ensure protection of all students including transgender students.

High School Diploma Requirements Revised & Alternate Credential Created for Students with an IEP

On May 19, 2017, the South Carolina Legislature amended South Carolina Code Section 59-39-100 to require that school districts provide students with personalized pathways for earning a uniform high school diploma. Students will continue to be required to earn the units of credit as prescribed by State Board of Education regulations; however, coursework must be aligned with a student's personalized diploma pathway. The State Board of Education shall promulgate regulations, which outline the process and procedures for approval of courses to personalize pathways based on students' postsecondary plans.

The Amendment also provides that the State Board of Education will develop criteria for a uniform, state-recognized employability credential that is aligned to the program of study for students with a disability whose Individualized Education Program team determines, and agrees in writing, that a diploma pathway would not provide a free

appropriate public education. The State Board of Education, in conjunction with the State Department of Education, will be required to develop a rubric and guidelines to identify and assess the employability skills of IEP students based on appropriate standards established.

This Act takes effect with students entering ninth grade beginning with the 2018-2019 school year.

New Football Stadium Requirements

On May 9, 2017, South Carolina Code Section 59-23-245 was enacted to adopt new building and plumbing codes, which specify the minimum number of water closets and lavatories for football stadiums to alleviate the undue financial burden on public schools.

The minimum standards provided for in this statute are notwithstanding applicable national, state, or local building codes, plumbing codes, school building regulations, or other provisions of law relating to the minimum numbers of required plumbing fixtures.

Study on Seizure Safety in Schools

As a result of the thousands of South Carolina students, families, teachers, school administrators, and staff impacted by students who have epilepsy, on May 10, 2017, the General Assembly created the "Seizures in Schools Study Committee." The committee will review information concerning epilepsy awareness among public school teachers, staff, and administrators; basic training in seizure response, existing laws and regulations affecting epilepsy, and seizure safety in public schools; and other areas related to epilepsy and seizure safety in public schools, which the committee considers necessary and relevant to its work.

School District Fiscal Practices & Budgetary Conditions

On May 9, 2017, South Carolina Code Section 59-20-90 was enacted to require the State Department of Education ("SDE") to develop and adopt a statewide program for identifying fiscal practices and budgetary conditions that, if uncorrected, could compromise the fiscal integrity of a school district. The program will include a series of criteria, which the SDE will use to establish three escalating levels of fiscal and budgetary concern: "fiscal watch," "fiscal caution," and "fiscal emergency."

Fiscal watch is the first and lowest level of concern. Fiscal caution is the second and intermediate level of concern. The State Superintendent of Education will notify a district in writing that a declaration of fiscal watch or fiscal caution is pending and will request a written proposal for correcting the conditions that led to fiscal watch or fiscal caution and for preventing further fiscal difficulties.

Fiscal emergency is the third and most severe level of concern. While a district is under a declaration of fiscal emergency, the district will be required to provide written proposals for discontinuing or correcting the practices and conditions, which led to the declaration of fiscal emergency. If the State Superintendent of Education finds a district has not made reasonable proposals or taken action to correct the practices or conditions that led to the declaration, the State Superintendent of Education may make a recommendation to the State Board of Education that it take over financial operations of the district for the fiscal year in which a fiscal emergency is declared until the district is released from a fiscal emergency.

Districts under a declaration of fiscal watch, fiscal caution, or fiscal emergency will not be released from that status in the same fiscal year in which the declaration was made but may be released the following fiscal year if the SDE determines corrective actions have been or are being successfully implemented. The provisions in this new law also apply to the statewide charter school district.

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