



EDUCATION LAW NOTES

Federal and Virginia Developments in School Law

Bradford A. King, Attorney at Sands Anderson

A VASSP Bimonthly Publication • January, 2022 • Vol. 5, No. 3 • www.vassp.org

COURT OF APPEALS UPHOLDS NO-TRESPASS DIRECTIVE AGAINST UNRULY LOUDOUN COUNTY PARENT

In welcome news for certain Loudoun County Public Schools ("LCPS") officials and administrators, including a principal, the United States Court of Appeals for the Fourth Circuit on December 3, 2021, affirmed as constitutional (1) the issuance of no-trespass letters to an increasingly disruptive father, and (2) his referral to child protective services. Ruling on allegations dating from 2015 and 2016 – and following meandering legal proceedings in both state and federal courts – the Fourth Circuit in *Davison v. Rose, Stephens, et al.*, affirmed the trial court's dismissal of the parent's constitutional claims.

The case arose primarily from no-trespass letters school defendants issued to parent Brian Davison barring him from school property and attendance at any school-sponsored activities unless expressly authorized otherwise. Davison was disruptive during school board meetings, on school property and on social media. He increasingly was critical of Loudoun County School Board policies and school board members. In September 2015, he appeared at a back-to-school night and a PTA meeting at his children's school, Seldens Landing Elementary, where witnesses asserted his behavior, conduct, tone, and demeanor prompted multiple complaints. He interrupted his children's teachers to raise non-germane questions. When confronted by Principal Tracy Stephens, he aggressively stated "Try me. Try me. You'll end up in Federal Court." Later, his children distributed flyers during class time, presenting Stephens' picture and their father's criticisms

of school policies and alleged violations of federal law. In response, Stephens issued (following a review by the LCPS Director of School Administration) Davison a no-trespass letter - later supplemented by no-trespass letters issued on behalf of the School Board.

Stephens' letter read in part: "You have stated publicly that you are a Navy veteran, publicly made allusions to "American Sniper," used the term 'SHOTGUN' in reference to a public meeting, referred to 'BE PREPARED' regarding a public meeting, referred to a public school as a 'target rich environment.' Used a quote that referred to a 'hand grenade,' made references to public officials' children, and made a reference to public officials meeting their creator, which have all contributed to intense fear among staff, caused disruption and time off tasks, causing great alarm and concern for the safety of Seldens Landing Elementary School. Your tone has been both aggressive and intimidating. Staff has reviewed your demeanor and are very concerned about your behaviors." Stephens also received a number of complaints from Davison's children's teachers about their well-being, prompting her to confer with her supervisors and division legal counsel before ultimately filing a CPS complaint against Davison. CPS investigated the matter and dismissed all allegations.

... school officials have the authority and responsibility for assuring parents and third parties conduct themselves appropriately while on school property.

aggressive and intimidating. Staff has reviewed your demeanor and are very concerned about your behaviors." Stephens also received a number of complaints from Davison's children's teachers about their well-being, prompting her to confer with her supervisors and division legal counsel before ultimately filing a CPS complaint against Davison. CPS investigated the matter and dismissed all allegations.

Davison's federal lawsuit sought both monetary and injunctive relief for a myriad of alleged constitutional deprivations. Among his

claims were that Stephens and a few other defendants engaged in First Amendment retaliation by issuing the no-trespass letters. The trial court and later the Fourth Circuit recognized that "while criticisms of staff are surely protected speech," Davison ignored the other stated reasons listed in the no-trespass bans – notably, what is included in the extensive quotation above. The Fourth Circuit specifically opined that "Davison has not sufficiently provided evidence to prove that the no-trespass ban was issued because of his protected speech, as opposed to his threats and antagonistic behavior." He did not experience unconstitutional retaliation. The Court reiterated its previous holdings that the right to communicate is not limitless, particularly where the plaintiff has engaged in a continuing pattern of verbal abuse and threatening behavior toward school officials. It also affirmed that school officials have the authority and responsibility for assuring parents and third parties conduct themselves appropriately while on school property. Here, the no-trespass bans were constitutional.

The Court of Appeals provided more detail in its analysis of whether Stephens retaliated against Davison by contacting child protective services ("CPS") – what the Court termed "a closer issue." It recognized that there is a possibility of serious consequences for parents reported due to mistaken suspicion of child abuse. Ultimately, however, citing its own precedent the Court of Appeals recognized that Virginia's child abuse is a mandatory reporting system that prioritizes the protection of children over the potential costs of a mistaken report. It affirmed that as a principal Stephens was a mandatory reporter, who would be subject to fines for failing to report and who enjoys protection – that is, immunity – from civil or criminal liability unless it is proven that the reporter acted with bad faith or malicious intent. (Citing Virginia Code Sections 63.2-1509, *et seq.*) "So long as the reporter was acting in the interest of protecting a child rather than out of self-interest or with an intent, for example, to settle some score with the child's parent, the plain intent of the legislature was to allow immunity to attach to the reporter."

Davison offered only conclusory suppositions that Stephens "frivolously" referred him to that CPS, without any supporting facts and could not overcome the presumption that Stephens possessed immunity. The Court held that Davison ignored that several teachers – none of whom were defendants in the lawsuit – expressed concerns to Stephens about his children, including on some instances that the children were "acting differently than they would typically," that there were instances when his daughter "would come to school without her lunch, without her homework, dressed not for the weather," and that "we could just see changes in the children's demeanor and see them withdrawing." The Court was impressed that Stephens conferred with her supervisors prior to filing the complaint, and that Davison's demeanor and state of mind caused her concern for the well-being of the children and his ability to care for them.

There is no conceivable child abuse prevention policy that both gives government the ability to respond to threats in order to prevent harms before they occur...

"Hard choices surround the issue of suspected child abuse. Virginia's reporting statute and its social services apparatus are both based on the assumption that false positives – mistaken reports of child abuse followed by DSS investigations – are less harmful than false negatives – serious harm to a child that could have been prevented but was not. . . . There is no conceivable child abuse prevention policy that both gives government the ability to respond to threats in order to prevent harms before they occur yet prevents government from investigating before being certain that a perceived threat is real. Policymakers must choose which of these harms is the greater evil." The Court of Appeals concluded "this report turned out to be a false positive as a subsequent investigation revealed that CPS was not concerned with Davison's interactions with his children. However, Stephens is still entitled to a strong presumption of immunity and Davison has not overcome that presumption."

In the right circumstances, no trespass directives and CPS reports are tools available, indeed required, of principals. As is often the case, administrators are well-advised to confer with division counsel before issuing either.