

ELLEN Z. AND ASSYA P.

Appellant,

v.

MONTGOMERY COUNTY
BOARD OF EDUCATION

Appellee.

BEFORE THE

MARYLAND

STATE BOARD

OF EDUCATION

Opinion No. 20-19

OPINION

INTRODUCTION

Ellen Z. and Assya P. (“Appellants”) appeal the decision of the Montgomery County Board of Education (“local board”) upholding the superintendent’s decision to deny Appellants’ Complaint regarding alleged violations of federal laws governing the privacy of student data or children’s data via use of privately developed applications. The local board filed a Motion to Dismiss. Appellants responded to the Motion, and the local board replied.

FACTUAL BACKGROUND

Appellant Ellen Z. appeared at the May 30, 2019 meeting of the local board in her capacity as a parent of a Montgomery County Public Schools (“MCPS”) student and member of the Montgomery County Council of PTAs (“MCCPTA”) Safe Tech Subcommittee. She expressed her concerns about independent apps available to parents and students designed to work with the MyMCPS portal (“Helper apps”) which Appellant believed violated the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. §1232g, 34 CFR Part 99, the Children’s Online Privacy Protection Act of 1998 (“COPPA”), 15 U.S.C. 6501-6505, 16 CFR Part 312, and the Protection of Pupil Rights Amendment (“PPRA”), 20 U.S.C. §1232h. The MyMCPS portal, and its companion, the MyMCPS classroom, are both tools that students and parents in MCPS must use to access classes, grades, assignments, and notifications from teachers. MCPS assigns login credentials to parents and students to access their own data. Appellant argued that the makers of the apps were using an MCPS trademark and that MCPS was required to issue a cease and desist letter to the creators of the apps. The Appellant offered no evidence regarding the alleged violations.

On June 4, 2019, Appellant Ellen Z. filed a “Complaint from the Public” with MCPS Superintendent Jack Smith in the form of a letter submitted jointly with Appellant Assaya P.¹ Appellants asserted violations of FERPA, COPPA, PPRA and trademark law. Appellants made conclusory statements that violations were occurring without any supporting facts or explanation of how the Helper apps functioned and without establishing that MCPS held a trademark. As a remedy, Appellants requested that MCPS issue cease and desist letters to the Helper apps

¹ Appellant Assaya P. is also a parent of a student attending MCPS and serves as co-chair with Appellant Ellen Z., of the MCCPTA Safe Tech Subcommittee.

demanding that they terminate use of the MCPS trademark, and requested MCPS to block the Helper apps from accessing the MyMCPS portal.

The Superintendent referred the matter to a hearing officer for review. In a memorandum dated July 22, 2019, the hearing officer provided the Superintendent's designee with factual background, the responses provided to Appellants regarding their concerns, and concluded with the recommendation that no further action was warranted by MCPS.² Specifically, the memorandum explained that the Helper apps were not controlled by or otherwise endorsed by MCPS, and that the Helper apps simply allow the students who choose to use the apps to visualize their own data in a different format. The Superintendent's designee responded to Appellants on July 26, 2019 concurring with the hearing officer's findings and recommendations that Appellants' concerns had been addressed appropriately by MCPS.

Appellants appealed to the local board, dropping the claims with respect to the PPRA and trademark law. Appellants persisted in their arguments regarding FERPA and COPPA, and for the first time alleged violations of the Student Data Privacy Act of 2015, Education Art. §4-131, the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, the Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, 104 Stat. 328 (1990), copyright law, and a general assertion that MCPS failed to respond to the issues raised in Appellants' prior complaint. Appellants repeatedly asserted that MCPS failed to address their concerns.

In an October 15, 2019 memorandum to the local board, the Superintendent reiterated that the apps in question were not developed or owned by MCPS, nor could the apps be downloaded onto any electronic devices issued by MCPS to students. The memorandum further emphasized that the apps did not access the student data itself, but allowed the user to visualize only that information to which the user was entitled by virtue of the login and password provided to access the MyMCPS Portal or MyMCPS classroom. Thus, by using the app, the user, not MCPS, was agreeing to give the app access to the data that the user was accessing from the MyMCPS Portal or MyMCPS classroom. The memorandum response acknowledged that Appellants had asserted additional claims under the Student Data Privacy Act, IDEA and ADA which were beyond the scope of the appeal, and noted that these claims were equally unsupported by any facts. The superintendent recommended that the local board uphold the determination that Appellants' concerns had been addressed. Appellants replied to the Superintendent's memorandum reiterating their arguments.

On November 14, 2019, the local board issued its decision and order denying the Complaint. The order explained that MCPS thoroughly investigated the allegations and determined that the Helper apps do not compromise the school system's data security or disclose any confidential student information. It further noted that there were no violations of trademark or copyright law because the Helper apps had not acted with any malice or expressed any affiliation with MCPS. The local board adjudicated the appeal based on the written record and affirmed the denial of Appellants' Complaint based on the issues presented in the original Complaint. Because Appellants did not assert claims related to the Student Data Privacy Act,

² Appellants also raised concerns related to the technology used in Naviance, which is an electronic survey tool to assist with career information via separate correspondence to MCPS. On June 28, 2019, MCPS responded to Appellant Ellen Z. and addressed her questions regarding the Naviance system. Appellants abandoned any arguments related to Naviance in the instant appeal.

5IDEA or the ADA in the original Complaint, the local board declined to address those allegations.

Appellants appealed the local board's decision to the State Board reiterating their previous arguments, and for the first time stated generally that MCPS violated MCPS guidelines. The local board filed a Motion to Dismiss the appeal maintaining that the Helper apps do not download information from the MyMCPS portal or otherwise keep a copy of the information or store the data. The Helper apps simply allow those students or parents who choose to use them to view their data in a different format. On January 27, 2020, Appellants filed a response to the local board's Motion seeking, for the first time, to include minutes of the April 7, 2019 Safe Tech Subcommittee meeting as support for their FERPA and COPPA claims. The local board filed a reply again requesting dismissal and reiterating that Appellants additional claims and evidence added after the initial Complaint and decision by the superintendent should not be considered further.

STANDARD OF REVIEW

When asked to interpret or explain Maryland's laws governing public education and State Board regulations, the Board exercises its independent judgment. COMAR 13A.01.05.06E.

Decisions of a local board involving local policy or a controversy and dispute regarding the rules and regulations of the local board shall be considered prima facie correct, and the State Board may not substitute its judgment for that of the local board unless the decision is arbitrary, unreasonable or illegal. Under COMAR 13A.01.05.03(B)(1)(d), the State Board may dismiss an appeal based on lack of jurisdiction.

LEGAL ANALYSIS

New Evidence

In their State Board appeal, Appellants for the first time seek to introduce the April 7, 2019 minutes of the Safe Tech Subcommittee to support their claims of violation under FERPA and COPPA. The State Board may receive new evidence if it is shown that the evidence is material to the issues in the case and that there were good reasons for failure to offer the evidence in the proceedings before the local board. COMAR 13A.01.05.04(C); *T.R. and B.J. v. Caroline County Bd. of Educ.*, MSBE Op. No. 20-06 (2020). Appellants, however, have failed to demonstrate the materiality of the minutes or that there was a good reason for failing to introduce the minutes before the local board. The minutes predate the Appellants' complaint by nearly two months yet the evidence was not offered until Appellants' final pleading before this Board. Moreover, the inclusion of the minutes does not aid or materially support Appellants' claim. Accordingly, the Board declines to consider this evidence. *See S.K. v. Montgomery County Bd. of Educ.*, MSBE Op. No. 19-14 (2019).

Claims Related to Federal Law

Appellants raise a variety of claims related to federal statutes, alleging violations of the FERPA, COPPA, IDEA, and ADA, each of which have that have their own enforcement

mechanisms.³ Where a separate forum exists to address the grievances under federal law, the State Board has declined to exercise jurisdiction. *Richard C. v. Anne Arundel County Bd. of Educ.*, MSBE Op. No. 19-271 (2019); *Phil N. v. Anne Arundel County Bd. of Educ.*, MSBE Op. No. 18-42 (2018).

The U.S. Department of Education enforces FERPA. An individual seeking to file a complaint for a violation of FERPA must file the complaint with the U.S. Department of Education's Student Privacy Policy Office.⁴ See 34 C.F.R. §99.63. The Federal Trade Commission enforces COPPA, and has an established process for filing a complaint.⁵ See 16 C.F.R. §312.9. The Board has long declined to extend its jurisdiction to special education matters because of other existing avenues of review. *S.K. v. Montgomery County Bd. of Educ.*, MSBE Op. No. 19-14 (2019)(declining to consider claims under IDEA); *Jon N. v. Charles County Bd. of Educ.*, MSBE Op No. 17-19 (2017)(declining to consider claims under IDEA, ADA and Section 504 of the Rehabilitation Act). Accordingly, all of Appellants' asserted claims related to federal statutes with separate enforcement mechanisms are dismissed for lack of jurisdiction.

Alleged Violation of Local Board Policy

Appellants made a general assertion that MCPS violated MCPS guidelines. However, Appellants failed to specify which MCPS guidelines were violated or offer any facts in support thereof. Furthermore, school system personnel repeatedly addressed Appellants' concerns about use of the Helper apps and explained that they simply allow those students or parents who choose to use them to view their data in a different format and do not compromise the school system's data security or disclose any confidential student information. The local board appropriately dismissed Appellants' claims.

Student Data Privacy Act Claims

The local board did not address the Appellants' claim that the school system violated the Student Data Privacy Act of 2015 because, like the IDEA and ADA claims, the issue was not properly before the local board given that it was not included in the complaint before the Superintendent. We will address the claim herein given the State Board's authority under Education Art. §2-205(e) to explain Maryland's laws governing public education.

The Student Data Privacy Act sets forth the obligations of operators of certain internet websites, online services, online applications, or mobile applications. Specifically, those websites, services and applications that: (1) are marked and designed primarily for a "preK-12 school purpose;" (2) are being used in accordance with a contract or agreement with a local school system primarily for prek-12 educational purposes; and (3) are issued to the student at the direction of a public school, a teacher, or any other employee of a public school, local school

³ In its decision, the local board did not address Appellants' PPRa claim because Appellants had abandoned that argument. In addition, the local board did not address Appellants' claims regarding the IDEA and the ADA because the Appellants failed to raise them in the in their initial complaint to the Superintendent that was the subject of the local board appeal.

⁴ Studentprivacy.ed.gov/file-a-complaint.

⁵ Complaints regarding COPPA may be filed at <https://www.ftccomplaintassistant.gov> or by calling (877) FTC-HELP.

system, or the Maryland State Department of Education. Education Art. §4-131(a)(3). A “PreK-12 school purpose” is defined as taking place at the direction of a public school, a teacher, an administrator, or a local school system, or one which “aids in the administration of public school activities.” Md. Code Ann., Ed. Art. §4-131(a)(5). The law places certain restrictions on the operator’s use and handling of covered information, and requires reasonable security measures be put in place to protect the information. Education Art. §4-131(c).

The requirements of the Student Data Privacy Act apply to operators of the websites, services and applications specified in the law. It is those operators and not the school systems who are bound to comply with the requirements. Thus, we find no violation here. Furthermore, the Appellants failed to demonstrate that the Helper apps were designed or marketed for a “preK-12 school purpose,” that the operators of the Helper apps had a contract or agreement with MCPS, or that the Helper apps were issued to students at the direction of MCPS.

CONCLUSION

For the reasons stated above, we dismiss those claims that are beyond the jurisdiction of the State Board and affirm the decision of the local board because it is not arbitrary, unreasonable or illegal. We further find no violation of the Student Data Privacy Act.

Signatures on File:

Warner I. Sumpter
President

Jean C. Halle
Vice-President

Gail H. Bates

Clarence C. Crawford

Charles R. Dashiell, Jr.

Vermelle D. Greene

Justin M. Hartings

Rose Maria Li

Rachel McCusker

Joan Mele-McCarthy

Lori Morrow

Michael Phillips

David Steiner

April 28, 2020