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Tri-District In-House Legal Counsel

Nº 199-022 (R99-042)

Pursuant to Arizona Revised Statutes Annotated ("A.R.S.") § 15-253(B), you recently submitted for review an education opinion you prepared for the Superintendent of Tempe School District No. 3, in which you concluded that A.R.S. § 15-843 applies to student readmission requests. While concurring with your conclusion, this Opinion clarifies portions of the analysis to emphasize the rights of students and their parents to participate in these proceedings.⁽¹⁾

Question Presented

What procedures must school district governing boards follow in connection with proceedings to consider readmission of students who have been expelled from school?

Summary Answer

School district governing boards must follow the procedures established by A.R.S. § 15-843 for all readmission decisions regarding previously-expelled students and comply with federal and State laws concerning the confidentiality of student records.

Background

Privacy of Educational Records. Both federal and Arizona laws protect the privacy of students' educational records. The federal Family Educational Rights to Privacy Act of 1974 ("FERPA") protects a student's privacy interests in "education records," which are defined as "those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4) (A); 34 C.F.R. § 99.3.⁽²⁾ Schools receiving federal funds may not release education records or personally identifiable information from those records (except for "directory information," as defined in 20 U.S.C. § 1232g(a)(5) (A)) unless the student's parents or guardians have consented in writing to such disclosures. 20 U.S.C. §§ 1232g(b)(1) & (2)(A); 34 C.F.R. § 99.30 (specifying the information the written consent must include).

Section 15-141, A.R.S., specifically mandates compliance with FERPA. It provides that "[t]he right to inspect and review educational records and the release of or access to these records, other information or instructional materials is governed by federal law in [FERPA] and federal regulations issued pursuant to such act." A.R.S. § 15-141(A). In addition, this section extends the protections described in FERPA to all educational institutions, regardless of whether they receive federal funds. A.R.S. § 15-141(B).

Statutory Standards for Student Disciplinary Proceedings.

Student disciplinary proceedings are governed by A.R.S. § 15-843. In this

statute, the Legislature focuses on protecting the privacy of the student while ensuring the student and his or her parents have access to the proceedings.⁽³⁾

In A.R.S. § 15-843(A), the Legislature exempted school district governing board actions "concerning discipline, suspension or expulsion of a pupil" from most of the provisions of the Open Meeting Law, A.R.S. §§ 38-431 through -431.09. However, in connection with disciplinary proceedings, the governing board of a school district must "post regular notice" of the action as required by the Open Meeting Law and "take minutes of any hearing held by the governing board concerning the discipline, suspension or expulsion of a pupil." A.R.S. § 15-843(A).

Section 15-843(F), A.R.S., requires that the governing board be notified in advance of any expulsion actions to be considered. That provision further requires that the board decide in an executive session whether to hold a hearing or whether to refer the matter to a hearing officer, and whether to hold any hearing in an executive session. *Id.* If the board decides to hold a hearing concerning the matter, it must provide written notice "at least five working days prior to the hearing" to "all pupils subject to expulsion and their parents or guardians of the date, time and place of the hearing." *Id.* In addition, if the hearing is to be held in an executive session, the notice must indicate that the parents or guardians have the right to object in writing to the governing board's decision to hold the hearing in executive session.⁽⁴⁾ *Id.* Notwithstanding the determination of the governing board, the parents or guardians of a pupil or an emancipated pupil may require that an expulsion hearing be held in an open meeting. A.R.S. § 15-843(G). The pupil, his or her parents or legal guardians, and legal counsel may attend the portion of "any executive session pertaining to the proposed disciplinary action" against the pupil. A.R.S. § 15-843(H). In addition, the same individuals must be given "access to the minutes and testimony of the executive session" and may record the session at the parents' or legal guardians' expense. *Id.*

Consideration of Student Readmission Requests. A.R.S. § 15-841(D) allows school district governing boards to consider the readmission of students who have previously been expelled. Such consideration may take place either annually "or upon the request of any pupil or the parent or guardian," and involves a review of the reasons for the expulsion. *Id.* The Legislature has not established a specific statutory process that governing boards must follow in considering student readmission.

Analysis

A. Section 15-843, A.R.S., Applies to Readmission Actions.

By its terms, Section 15-843(A) unambiguously applies to all actions that "concern" the "discipline" of a student. Where legislative language is plain and unambiguous, the statutory text is applied as written. *See Mid Kansas Fed. Sav. & Loan Ass'n v. Dynamic Dev. Corp.*, 167 Ariz. 122, 128, 804 P.2d 1310, 1316 (1991). Because "discipline" is not defined by statute, rules of statutory construction dictate that we give that term its ordinary meaning.⁽⁵⁾ A.R.S. § 1-213; *Harrelson v. Industrial Comm'n*, 144 Ariz. 369,

374, 697 P.2d 1119, 1124 (App. 1984). "Discipline" is "training . . . that corrects, molds strengthens, or perfects . . . the mental faculties or moral character," and "to penalize for the sake of discipline." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 644, 645 (1993).

Keeping in mind that statutes should not be read to create illogical results (see *Canon School Dist. No. 50 v. W.E.S. Constr. Co. Inc.*, 177 Ariz. 526, 530, 869 P.2d 500, 504 (1994)), readmission determinations, which involve a review of the factual bases for the expulsion, fall within the ambit of disciplinary actions that the statute is meant to address. Readmission is part of the spectrum of punishment used by school district governing boards to maintain order and obedience within schools; in particular, it is the ending to punishment by expulsion. See A.R.S. § 15-840(i) (expulsion means "the permanent withdrawal of the privilege of attending a school unless the governing board reinstates the privilege of attending the school"). Thus, applying traditional rules of statutory construction leads to the conclusion that readmission hearings are actions concerning discipline and are therefore governed by A.R.S. § 15-843. Moreover, because a readmission request or review under A.R.S. § 15-841(D) is directly linked to an expulsion, the procedures outlined in A.R.S. § 15-843 that apply to expulsions also apply to readmissions.⁽⁶⁾

In A.R.S. § 15-843(A), the Legislature provided that an "action" concerning the readmission of a previously-expelled student is not subject to most of the requirements of the Open Meeting Law, although public notification and minutes are still required. Although exempt from most of the requirements of the Open Meeting Law, a hearing on a readmission request must be held in an open meeting upon the request of the student's parent or guardian. A.R.S. § 15-843(G). The statute also allows the student and his or her parents or guardians to attend executive sessions "pertaining to the proposed disciplinary action" and to have access to the minutes of those proceedings. A.R.S. § 15-843(H). Indeed, *all* board discussions concerning readmission requests that are held in executive session, except for those wherein the board is only receiving legal advice from its counsel, must be open to the student whose readmission is being considered, his or her parents or guardians, and legal counsel.⁽⁷⁾ *Id.* This includes the initial executive session described in A.R.S. § 15-843(F)(2), at which the board decides whether to hold a hearing or refer the matter to a hearing officer and whether to hold any hearing in an executive session.⁽⁸⁾ A decision by a board in an executive session under A.R.S. § 15-843(F)(2) to hold the hearing in executive session is, of course, subject to the right of the parent, guardian or emancipated student to require that the hearing occur in an open meeting under A.R.S. § 15-843(G). The school board must also notify parents and students of readmission procedures as required by A.R.S. § 15-843(M) and (N).

B. Federal and State Privacy Laws Apply to Readmission Actions.

In addition to complying with A.R.S. § 15-843, school district governing boards must also comply with FERPA and A.R.S. § 15-141(A) when making readmission determinations. Under both FERPA and A.R.S. § 15-

141(A), student records are confidential, and except in a few statutorily-delineated special instances, only the most fundamental information regarding a student, denominated as "directory information" by FERPA, may be disclosed without prior written consent of a student's parents or guardians (or the student herself, if emancipated).⁽⁹⁾

FERPA allows the disclosure of information related to any disciplinary action taken against the student only when that action was related to conduct "that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community." 20 U.S.C. § 1232g(h); 34 C.F.R. § 99.36(b). Even in those circumstances, the disciplinary information may be disclosed only to teachers or school officials "who have been determined to have legitimate educational interests in the behavior of the student." *Id.*

Although A.R.S. 15-843(F)(2) gives the school district governing board the authority to determine whether to hold hearings or discussions in executive session, rather than in an open meeting, the board must ensure that the hearing protects the confidentiality of student records as required by FERPA and A.R.S. § 15-141(A). Unless the parent, guardian or emancipated student requires that the hearing occur in an open meeting under A.R.S. § 15-843(G), this will require an executive session to discuss the student's records. To satisfy the requirements of FERPA and A.R.S. § 15-141, school district governing boards must require that a request to hold a readmission (or an expulsion) hearing in a public meeting be in writing and signed by the student's parent or guardians. *See* 20 U.S.C. § 1232g(b)(1) and (2)(A); 34 C.F.R. § 99.30.

Conclusion

School district governing boards should follow the disciplinary procedures established by A.R.S. § 15-843 in connection with student readmission requests, including those procedures governing expulsion hearings. In addition, the school district governing board must ensure compliance with FERPA and A.R.S. § 15-141, which protect the confidentiality of education records.

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Attorney General

1. Under A.R.S. § 15-253(B), the Attorney General must "concur, revise or decline to review" opinions of county attorneys relating to school matters submitted for review. Although this provision expressly applies to opinions of county attorneys, it also pertains to private counsel's education law opinions. *See* Ariz. Op. Att'y Gen. I99-006.

2. FERPA contains four narrowly crafted exceptions to the general definition of "education records." *See* 20 U.S.C. § 1232g(a)(4)(B). None are applicable to the issue addressed in this opinion.

3. The Legislature's focus on parental participation and student privacy is also reflected in the laws governing a school board's review of a teacher's decision to promote or retain a

student in a grade in common school or pass or fail a student in a high school course. *See* A.R.S. § 15-432(11). That statute allows the board to conduct its review in executive session but permits a parent to require that the review be conducted in an open meeting. *Id.*

4. Should a pupil's parents or guardians disagree among themselves about whether a hearing regarding expulsion should be held in executive session, Section 15-843(G)(1) allows the governing board to decide in an executive session whether to hold the hearing in an executive session or in an open meeting.

5. The other terms used in Section 15-843(A), "expulsion" and "suspension," are defined in A.R.S. § 15-840.

6. The procedures in A.R.S. § 15-843 protect a student's due process rights. *See Tiffany v. Arizona Interscholastic Ass'n, Inc.*, 151 Ariz. 134, 136, 726 P.2d 231, 233 (App. 1986) (noting that the U.S. Supreme Court has held that a student's entitlement to a public education is a property right protected by the due process clause); *accord Kelly v. Martin*, 16 Ariz. App. 7, 9, 490 P.2d 836, 838 (1971) ("with respect to discipline of students in public educational institutions involving the possible imposition of serious sanctions such as a suspension or expulsion, the requirements of procedural due process under the Fourteenth Amendment are applicable").

7. Section 15-843(H), A.R.S., does not prevent the governing board from receiving legal advice from its counsel outside of the presence of the student, his or her parents and guardians and legal counsel for the student. *See* A.R.S. § 12-2234 (codifying attorney-client privilege). However, just as public bodies cannot use the presence of an attorney to circumvent the Open Meeting Law requirements for open deliberations, governing boards cannot use the right to confidential communications with counsel to undermine the rights of students and their parents to be present at executive sessions under A.R.S. § 15-843(H). *See City of Prescott v. Town of Chino Valley*, 166 Ariz. 480, 485, 803 P.2d 891, 896 (1990) ("mere presence of an attorney at an executive session cannot be used to circumvent the Open Meeting Law"); *Fisher v. Maricopa County Stadium Dist.*, 185 Ariz. 116, 124, 912 P.2d 1345, 1353 (App. 1995) (discussions of what action to take based on legal advice must occur in public). Therefore, notwithstanding the presence of counsel for the school district, once a governing board begins to discuss the merits of readmission requests or what action they intend to take on the requests, the discussion must again include the students at issue and their parents or guardians and legal counsel. *See id.*

8. This conclusion that the student and his or her parents and legal counsel must be permitted to attend all executive sessions on readmission issues (except for those limited to legal advice) is consistent with previous advice from this Office in a matter that led to your opinion. In particular, after receiving a complaint from a parent alleging she was not going to be permitted to attend an executive session concerning the readmission of her son, attorneys from this Office properly objected to such a process. The procedures for public notice and parental access to all aspects of the proceedings are central to the statute and cannot be disregarded.

9. "Directory information" includes a student's name, address, telephone number, date and place of birth, fields of study, participation in school activities, dates of attendance, degrees and awards received, and any other information that "would not generally be considered harmful or an invasion of privacy if disclosed." 34 C.F.R. § 99.3.

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