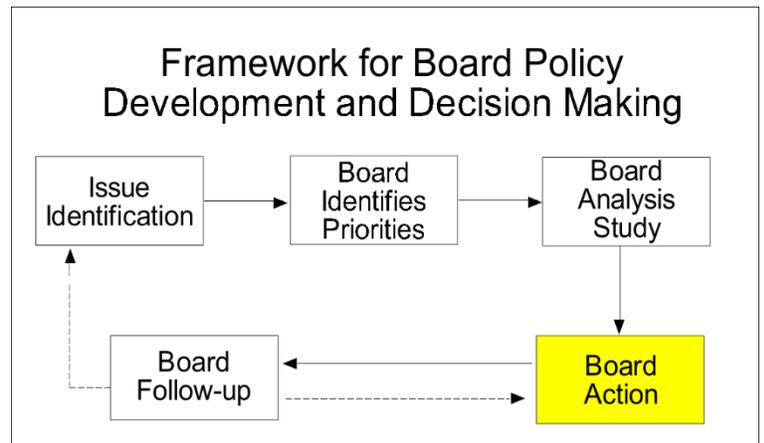


Iowa State Board of Education

Executive Summary

March 23, 2023



Agenda Item: Appeal Decision, # 5168, Gilbert Community School District

State Board Priority: Creating a Safe, Healthy, and Welcoming Learning Environment

State Board Role/Authority: The State Board has the duty to decide this case under Iowa Code section 290.1.

Presenter(s): Thomas A. Mayes, attorney
Parties and Counsel

Attachment(s): Two

Recommendation: It is recommended that the State Board decide this matter, under the deferential scope of review for appeals of school board decisions.

Background: Appellants challenge a decision of the Gilbert Community School District board of directors to update its handbook to require permission to video record on District property or District events, without consent of a District employee. The ALJ's proposed decision affirmed the handbook language, and the Appellants timely filed a formal notice of appeal.

IOWA DEPARTMENT OF EDUCATION
_____ D.o.E. App. Dec. _____

ERIC AND CHRISTINE HENELY,)	DIA Docket No. 23DOE0002
)	Dept. Ed. Docket No. 5168
Appellants,)	
)	
v.)	
)	
GILBERT COMMUNITY)	
SCHOOL DISTRICT,)	
)	PROPOSED DECISION
Appellee.)	

Appellants Eric Henely and Christine Henely filed an appeal to the State Board of Education, pursuant to Iowa Code section 290.1, of a decision rendered by the Gilbert Community School District Board of Directors. A telephone hearing in the matter was held on November 1, 2022. Appellant Eric Henely was present and presented testimony. Appellants submitted Exhibits A through M, which were admitted as evidence in the case. P.H., Appellants' son, also testified for the Appellants. Appellee Gilbert Community School District was represented at hearing by attorney Carrie Weber. Superintendent Christine Trujillo and school board president Andrew Ricklefts testified on behalf of the Appellee. The Appellee submitted Exhibits 1 through 6, which were admitted as evidence in the case.

At hearing, arrangements were made for the parties to submit briefs following the hearing. The parties were to submit an initial brief by November 11, 2022 and any reply brief by November 18, 2022. Following the hearing, Appellants requested that the parties' deadline to submit a reply brief be extended to November 23, 2022. That request was granted. Both parties timely submitted an initial brief and a reply brief.¹

FINDINGS OF FACT

On September 12, 2022, the board of directors of Appellee Gilbert Community School District (District) approved updated handbook language related to photography, video, and audio recording in schools. The handbook language approved by the school board provides:

At no time are students or visitors authorized to video capture, photograph, or audio record others in the school building or on school property (to include school vehicles) while at school activities (unless recording a public performance, such as a school play, game, concert,

¹ Appellee attached an exhibit, Exhibit 1, to its post-hearing brief. No arrangements were made to hold the record open for additional exhibits following the hearing. Accordingly, this exhibit is not included as part of the record and was not considered in making the decision in this matter.

contest, etc.), without the consent of a teacher, coach, or school administrator.

(Exh. 1).

Each school in the District has a handbook. Principals in each District building, along with a committee of teachers and administrators, work to ensure that the policies in the handbook are aligned with building practices and are reasonable policies that protect students and staff. In the case of this handbook language, administrators wanted to protect the privacy of students and staff and did not want recording during the school day or at school events to cause disruption in the school environment. Ultimately, the superintendent makes a recommendation regarding handbook language to the board, which acts upon the recommendation. (Trujillo, Ricklefs testimony).

The Appellants have requested permission in the past to video record IEP meetings held related to their son. The Appellants have not been permitted to video record those meetings, but school officials have always allowed Appellants to audio record their son's IEP meetings. (Trujillo, E. Henely testimony).

Teachers, coaches, and school administrators are permitted to use their discretion in deciding whether to permit a student or visitor to photograph or create an audio or video recording in the school building or on school property under the policy. No explicit criteria have been adopted or published to guide those employees in exercising their discretion. (Trujillo testimony).

CONCLUSIONS OF LAW

Pursuant to Iowa Code section 290.1, an affected pupil or the parent or guardian of an affected minor pupil who is aggrieved by a decision or order of the board of directors of a school corporation may appeal the decision or order to the state board of education. The rules regarding the procedures for such an appeal are found at 281 Iowa Administrative Code Chapter 6.

An agency's authority to review a school district's decision is only as broad as that vested in it by statute or regulation.² "[W]here a statute provides for a review of a school district's discretionary action, the review, by necessary implication, is limited to determining whether the school district abused its discretion."³ In applying the abuse of discretion standard, the Board must look to whether a reasonable person could have found sufficient evidence to come to the same conclusion as reached by the school district.⁴

The Appellants argue that the District's decision to adopt the proposed handbook language related to audio and video recording in schools should be reversed because the District's rule violates the First Amendment. The District argues that it did not abuse its

² *Sioux City Community School Dist. v. Iowa Dept. of Educ.*, 659 N.W.2d 563, 568 (Iowa 2003).

³ *Id.*

⁴ *See id.* at 569 (citing Iowa Code § 17A.19(10)(f)(1)).

discretion in adopting the handbook language and the cited portion of the handbook does not violate the Appellants' First Amendment rights.

As an initial matter, the school board decision that the Appellants appeal here was to approve a district-wide policy regarding photography and audio and video recording in the District's school buildings and on school property that had been recommended by the superintendent after review by a committee of administrators and teachers. The policy that the school board approved placed decisionmaking authority with regard to when recording could occur in the hands of teachers, coaches, and school administrators. The Appellants appear to argue that the policy the board adopted violates the First Amendment on its face; that is, it is unconstitutional regardless of the context in which it is examined and should be invalidated. In addition, the Appellants make arguments that the policy is unconstitutional as applied to them.

With regard to the as applied challenge, the Appellants have a long history of requesting to be able to videotape IEP team meetings related to their son. These IEP team meetings include the Appellants and other District employees and typically take place in the school setting. The evidence is undisputed that District staff has not allowed the Appellants to videotape those meetings, but has always allowed them to audio record the meetings. The Appellants have previously attempted to challenge the staff decision not to allow them to videotape IEP meetings in other forums.

In 2019, the building principal made a decision to allow the Appellants to audio record, but not video record, their son's IEP team meeting. The Appellants requested that the school board take action on this matter, asserting that the District had violated their constitutional rights under the First and Fourteenth Amendments. The school board informed the Appellants that it would not take action on their complaint and the Appellants filed an appeal under Iowa Code section 290.1, the same section under which the current appeal arises. The administrative law judge in that case concluded that there was no jurisdiction for the State Board of Education to exercise jurisdiction over the appeal as the school board had not acted on the Appellants' complaint or issued a decision that would be subject to appeal. As the school board had the discretion under state law to determine whether or not to address a complaint, its election not to address the Appellants' complaint was final pursuant to Iowa Code section 279.8 and not reviewable as a decision or order under section 290.1.⁵

In June 2020, Appellant Eric Henely filed a state complaint with the Iowa Department of Education pursuant to the Individuals with Disabilities in Education Act (IDEA) challenging the District's decision to allow audio recordings of IEP team meetings, but to disallow video recordings of those meetings. The Department of Education made a finding of not confirmed with respect to the complaint, concluding that the IDEA does not require the District to allow video recording of IEP team meetings, particularly when audio recording is allowed.⁶

⁵ See Respondent's Resistance to Motion for Preliminary Injunction, at DIST2 – DIST5.

⁶ See Respondent's Resistance to Motion for Preliminary Injunction, at DIST6 – DIST9.

In 2021, the Appellants then filed a due process complaint pursuant to the IDEA asserting that the District's decision prohibiting them from videotaping IEP team meetings was a violation of the IDEA. The administrative law judge dismissed the Appellants' complaint, finding that they had not raised an issue related to the identification, evaluation, or educational placement of a child with a disability, or the provision of a free appropriate public education to the child, which are the only matters that can be asserted through a due process complaint.⁷

The Appellants reiterate many of their arguments in this proceeding related to why they believe they should be allowed to videotape IEP team meetings related to their son. This was not the question that was before the school board when it made its decision regarding the district-wide policy on photography and audio and video recordings. The board's decision that is under appeal was the decision to approve a policy that placed discretion in the hands of teachers, coaches, and school administrators to decide when photography and recording would be allowed in school buildings outside of the context of public performances, such as plays, concerts, and sporting events. To the extent that the Appellants wish to challenge the decision of a particular staff member regarding how the discretion granted to that staff member by the school board is exercised, such a challenge is not available under section 290.1.

The only issue before the State Board of Education in this matter, then, is whether the policy that the school board approved was an abuse of discretion because, as Appellants argue, it violates the First Amendment on its face. The policy that the school board passed prohibits all photography, audio recording, and video recording on school grounds outside of a public performance like a sporting event or concert, unless it is specifically approved by a teacher, coach, or administrator. A primary consideration in First Amendment case law is whether the restriction in question is content-based or content neutral. Laws or policies that distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content-based. Content neutral regulations are those that implicate, for example, the time, place, or manner of speech.⁸ The policy at issue here is content neutral. There is no need to view the content of a recording in order to determine whether it violates the policy; the fact that a recording is made on school property or grounds without authorization is enough to make that determination.⁹

Another important consideration with regard to a First Amendment challenge is where the restriction of speech takes place; greater protection is afforded to speech that takes place in a public forum. In that context, government can impose restrictions on speech only so long as the restrictions are justified without reference to content, narrowly

⁷ See Respondent's Resistance to Motion for Preliminary Injunction, at DIST10 – DIST13.

⁸ *State v. Musser*, 721 N.W.2d 734, 743 (Iowa 2006) (citing *Turner Broad. Sys., Inc.*, 512 U.S. 622, 642-43 (1994); *Consol. Edison Co. of N.Y., Inc.*, 447 U.S. 530, 536 (1980)).

⁹ See *Ness v. City of Bloomington*, 11 F.4th 914, 923-94 (8th Cir. 2021).

tailored to serve a significant governmental interest, and leave open alternative channels for communication of the information.¹⁰

In contrast to restrictions in traditionally public forums such as streets and parks, restriction of speech on public property which is not by tradition or designation a forum for public communication, such as a school, is governed by a different standard. In a non-public forum, time, place, and manner restrictions are allowable; additional reasonable regulations on speech are permissible as long as the regulation is not an effort to suppress expression merely because public officials oppose the speaker's view.¹¹ In a non-public forum, restrictions must be reasonable in light of the purpose which the forum at issue serves, but need not be the most reasonable or the only reasonable limitation.¹² Reasonable restrictions adopted in a viewpoint neutral manner in a non-public forum do not violate the First Amendment.¹³

This is precisely the situation here. The school board approved reasonable restrictions on photography, audio recording, and video recording in the school setting that are content neutral. The restrictions are reasonable based on the ubiquity of recording devices in today's world and the potential for disruption if there were no boundaries around such recording in the school setting. The board also considered privacy issues, especially related to student privacy. The board vested the authority to make decisions about recording on a case-by-case basis in teachers, coaches, and administrators, the very individuals who are best situated to determine the level of disruption recording would create in a given situation. Even the Appellants conclude that the challenged policy would withstand scrutiny under a rational basis test.¹⁴

The cases that the Appellants cite in their briefs in support of the argument that the right to make audiovisual recordings of "police, government officials, and matters of public concern" has been "clearly established" all deal with recordings made in a public forum. Seven of the eight cases relate to recordings of police officers engaged in official business. These cases are not analogous to the issue present here.

Likewise, the Appellants cite several cases that they argue stand for the proposition that a public school teacher does not have the right to privacy in a public school classroom. The Appellants appear to argue that this means that any videotaping by anyone must be allowed in a public school. The cases do not stand for that proposition; rather, they deal with public school teachers who were videotaped by their employers for the purposes of determining adequate performance. The teachers in the cases cited made arguments

¹⁰ *Hoye v. City of Oakland*, 653 F.3d 835, 844 (9th Cir. 2011) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

¹¹ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (citation omitted); see also *Victory Through Jesus Sports Ministry Foundation v. Lee's Summit R-7 Sch. Dist.*, 640 F.3d 329, 334-35 (8th Cir. 2011); *Larsen v. Fort Wayne Police Dept.*, 825 F.Supp.2d 965, 980 (N.D. Ind. 2010).

¹² *Victory Through Jesus Sports Ministry Foundation*, 640 F.3d at 335.

¹³ *Id.* at 337.

¹⁴ See Appellants' Reply Brief, at p. 2.

under the Fourth Amendment and a Texas constitutional protection of personal privacy from unreasonable intrusion.¹⁵

The Appellants' arguments regarding the alleged underinclusiveness and overinclusiveness of the policy at issue are similarly unpersuasive. In a non-public forum, the strict scrutiny standard, which requires that any restriction be narrowly tailored to serve a compelling government interest, does not apply. The only requirements, as noted above, are that the restrictions be reasonable and content neutral. They do not have to be the best or most reasonable limitation.

The Appellants raise other issues in their briefs that are not relevant to the case presented. For example, the Appellants request a ruling on three separate policies that the District has issued related to audiovisual recordings on school grounds. The Appellants are appealing the action of the school board in issuing the current handbook language only; any previous versions of the policy are irrelevant. To the extent that this decision does not address each and every argument that the Appellants have set forth in their briefing, the undersigned has determined that the arguments not specifically addressed are inapplicable to the issue set forth in this appeal.

It is clear from their actions that the issue of videotaping IEP meetings has become very important to the Appellants. The school board, however, has broad authority to regulate what goes in the school setting. The policy the school board approved and that the Appellants challenge does not violate the First Amendment, for all of the reasons discussed above. Examining the evidence in the record, a reasonable person could have found sufficient evidence to come to the conclusion that the policy adopted by the school board regarding photography, audio recording, and video recording was reasonable in light of the need to maintain an orderly and productive learning environment and to protect the rights of students and others in the school setting. Accordingly, the Appellants' appeal is denied and the school board's decision is affirmed.

ORDER

The Appellants' appeal is denied. The school board's decision to approve the policy regarding photography, audio recording, and video recording was not an abuse of its discretion.

¹⁵ See *Plock v. Board of Educ. Of Freeport Sch. Dist. No. 145*, 545 F.Supp.2d 755, 758 (N.D. Ill. 2007); *Roberts v. Houston Indep. Sch. Dist.*, 788 S.W.2d 107, 111 (Court of Appeals of Texas 1990).

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Appeal Rights

Any adversely affected party may appeal a proposed decision to the state board within 20 days after issuance of the proposed decision.¹⁶ An appeal of a proposed decision is initiated by filing a timely notice of appeal with the office of the director. The notice of appeal must be signed by the appealing party or a representative of that party and contain a certificate of service.¹⁷ The requirements for the notice are found at Iowa Admin. Code r. 281-6.17(5). Appeal procedures can be found at Iowa Admin. Code r. 281-6.17(6). The board may affirm, modify, or vacate the decision, or may direct a rehearing before the director or the director's designee.¹⁸

¹⁶ 281 Iowa Administrative Code (IAC) 6.17(4).

¹⁷ 281 IAC 6.17(5).

¹⁸ 281 IAC 6.17(7).

IOWA DEPARTMENT OF EDUCATION
(cite as _____ D.o.E. App. Dec. _____)

Eric Henely &)
Christine Henely,)
Appellants,) Docket 5168
vs.)
Gilbert Community) FINAL DECISION
School District,)
Appellee.)

After due consideration by the State Board of Education, the proposed decision in this matter is

_____ AFFIRMED.

_____ OTHER (describe).

This is final agency action in a contested case proceeding.

Any party that disagrees with the Department's decision may file a petition for judicial review under section 17A.19 of the Iowa Administrative Procedure Act. That provision gives a party who is "aggrieved or adversely affected by agency action" the right to seek judicial review by filing a petition for judicial review in the Iowa District Court for Polk County (home of state government) or in the district court in which the party lives or has its primary office. Any petition for judicial review must be filed within thirty days of this action, or within thirty days of any petition for rehearing being denied or deemed denied.

Dated: March 23, 2023

Iowa State Board of Education, by:

John Robbins, President