

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BENJAMIN M. AUSLANDER	:	No.
	:	
Plaintiff	:	
	:	
v.	:	
TREDYFFRIN/EASTTOWN	:	
SCHOOL DISTRICT, ARTHUR J.	:	
MCDONNELL , in his individual and	:	
official capacities.	:	
Defendants	:	

COMPLAINT

This is a first amendment retaliation case. The First Amendment protects individuals from reprisal by government officials in exercising their First Amendment rights. *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (“Official reprisal for protected speech offends the Constitution [because] it threatens to inhibit exercise of the protected right and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out.”) (citations and quotations omitted). The First Amendment also protects “the public's right of access to information about their officials' public activities.” *Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3d Cir. 2017). Access to information leading to “discourse on public issues” is accorded “the highest rung of hierarchy of First Amendment values and is entitled to special protection.” *Id.* (citations omitted). The First Amendment’s protection to individuals to access important information includes the right to record (by video or

audio) government conduct. *Id.* (The First Amendment protects an individual’s right to “record what there is the right for the eye to see or the ear to hear.”)

The teaching of critical race theory (“CRT”) in the nation’s public schools has engendered a robust discourse and debate. Joshua Jamerson, “Critical Race Theory: What It Means for America and Why It Has Sparked Debate,” Wall Street Journal (July 17, 2021).¹ Defendant Tredyffrin/Easttown School District openly maintains a CRT curriculum and indoctrination program for teachers, staff, and students. <https://www.tesd.net/Page/16577> (last visited March 22, 2022). Plaintiff, Mr. Auslander, is a parent of a student in the school district and a taxpayer who made a Right to Know Request to access the school district’s CRT program materials. He has requested all records, lessons, and materials prepared by Pacific Educational Group (“PEG”), the school district’s CRT consultant. The school district denied his request to provide the records, lessons, and materials, but granted an *in-camera* review of the material created by PEG.

During that *in-camera* review, Mr. Auslander chose to make a voice recording of what he was observing from the materials produced. Defendants threatened him with civil and criminal liability if he continued to make a verbal record of what he was reading. When Mr. Auslander continued to make audio recordings of his inspection, Defendants ended the inspection and forced plaintiff to leave the premises.

¹ <https://www.wsj.com/articles/critical-race-theory-what-it-means-for-america-and-why-it-has-sparked-debate-11623956268> (last accessed March 22, 2022).

Plaintiff seeks a preliminary injunction against Defendants prohibiting them from interfering with his constitutional right to speak and record his voice while conducting a public records inspection. He also seeks nominal damages.

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff, Benjamin M. Auslander, is a resident of Chester County Pennsylvania and a taxpayer in the Tredyffrin /Easttown School District.

2. Defendant Tredyffrin/Easttown School District (“School District”) is a political body organized under the law of the Commonwealth of Pennsylvania.

3. Defendant Arthur J. McDonnell is the business manager and secretary of the Tredyffrin/Easttown Board of Education. At all relevant times Mr. McDonnell was acting as an agent, servant, or employee of the Tredyffrin/Easttown School District and acting within the scope of his employment. Mr. McDonnell has final decision-making authority for the School District and is responsible for implementing the policies, practices, customs, and procedures for the School District. Mr. McDonnell is sued in his official and individual capacity.

4. The Court has subject-matter jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 1343, and 42 U.S.C. § 1983.

5. Venue is proper because a substantial part of the events giving rise to the claims occurred in this judicial district. *See* 28 U.S.C. § 1391(b)(2).

STATEMENT OF FACTS

6. Defendant Tredyffrin/Easttown School District openly maintains a CRT curriculum and indoctrination program for teachers, staff, and students. <https://www.tesd.net/Page/16577> (last visited March 22, 2022).

7. The curriculum and program are produced by a third-party vendor, Pacific Educational Group. *Id.*

8. The School District pays for the PEG CRT curriculum and program using taxpayer funds.

9. Mr. Auslander is a parent of a student in the school district and a taxpayer in the school district.

10. Mr. Auslander made a Right to Know Request on January 19, 2022 for all records, lesson plans, and materials prepared by PEG, the school district's CRT consultant.

11. On January 26, 2022, Defendants denied Plaintiff's request for copies of the PEG training materials asserting the materials were protected by copyright.

12. On January 26, 2022, Defendants agreed to allow Plaintiff to conduct an *in-camera* review of the PEG CRT training materials. However, Mr. Auslander was notified he could not copy or photograph the records because the documents were protected by copyright.

13. On February 7, 2022, Mr. Auslander went to the Tredyffrin/Easttown School Board Administrative Offices located at 940 West Valley Road, Suite 1700,

Wayne, PA 19087, to inspect the records. Defendant, Mr. McDonnell was present at the inspection.

14. During Mr. Auslander's review of the records he made verbal recordings on his smart phone of what his eyes were seeing.

15. Defendant, Mr. McDonnell, threatened Mr. Auslander with criminal and civil liability if he continued to record the sound of his own voice describing what his eyes were seeing. Defendant, Mr. McDonnell threatened to hold plaintiff liable under the Wiretapping and Electronic Surveillance Control Act for recording his own voice. He also threatened to hold plaintiff liable under "copyright laws."

16. Defendant, Mr. McDonnell also called the school district's attorney and threatened to call PEG's attorney.

17. After Mr. Auslander refused to stop recording his voice, Defendant Mr. McDonnell terminated the meeting and ordered plaintiff to vacate the premises.

18. Defendant, Mr. McDonnell made these threats after consulting with counsel.

19. At all times, Defendant Mr. McDonnell was acting as an actual or apparent agent or official representative of Defendant Tredyffrin/Easttown School District.

20. Defendant, Mr. McDonnell, was or should have been aware that by threatening, coercing, and ending Mr. Auslander's inspection of public documents because Mr. Auslander was exercising his first amendment right to speak, Defendant, Mr. McDonnell was violating Mr. Auslander's clearly established rights.

21. Defendants knowingly violated Mr. Auslander's clearly established Constitutional rights.

CAUSES OF ACTION

**Claim 1: Restriction on First Amendment Rights
42 U.S.C. § 1983**

22. It is the official custom, practice, and policy of the school district to prohibit individuals from video or voice recording documents related to the school district's CRT program or documents produced by PEG for the school district.

23. The official custom, practice, and policy is not narrowly tailored to achieve a compelling government interest.

24. Defendants violated plaintiff's First Amendment rights when they used the official custom, practice, and policy to prohibit plaintiff from making video or voice recordings of what he observed from the materials the school district produced in response to Mr. Auslander's Right to Know Request.

**Claim 2: First Amendment Retaliation
42 U.S.C. § 1983**

25. Mr. Auslander engaged in constitutionally protected conduct when he created a voice recording on what he was observing during his inspection of the documents the school district produced in response to his Right to Know Request.

26. Defendants engaged in retaliatory conduct through threats of civil and criminal penalties, and ultimately removing Mr. Auslander from the premises.

27. Defendants' conduct was sufficient to deter a person of ordinary firmness from exercising his constitutionally protected right.

28. There is a casual link between the constitutionally protected conduct and the retaliatory action.

29. Defendants' threats were contemporaneous with Mr. Auslander's protected speech.

30. Defendant School District is liable because Defendant Mr. McDonnell has final decision-making authority. He is an actual or apparent agent of the School District.

31. Defendant School District is liable because it is the official custom and policy of the School District to prohibit audio or video recording of the PEG training materials which are public records.

32. Mr. Auslander had a right to inspect these public records.

DEMAND FOR RELIEF

33. Plaintiff respectfully requests that the court:

a. enter a preliminary and permanent injunction that prevents defendants from interfering with Plaintiff, Mr. Auslander's constitutionally protected First Amendment rights;

b. enter a preliminary and permanent injunction prohibiting Defendants from interfering with Plaintiff, Mr. Auslander's constitutionally protected First Amendment right to video and audio record or copy or photocopy all records Defendants produced in response to plaintiff's right to know request;

- c. enter a preliminary and permanent injunction prohibiting Defendants from preventing Plaintiff, Mr. Auslander, from making video or voice recording or copies or photocopies of any material prepared by Pacific Educational Group;
- d. awarding plaintiff nominal damages;
- e. award costs and attorneys' fees under 42 U.S.C. § 1988; and
- f. award all other relief that the Court deems just, proper, or equitable.

Respectfully submitted,

Dated: April 12, 2022

/s/ Walter S. Zimolong
WALTER S. ZIMOLONG III, ESQUIRE
Zimolong, LLC
Attorney I.D. 89151
wally@zimolonglaw.com
PO Box 552
Villanova, PA 19085-0552
Tele: 215-665-0842

/s/ Nicholas R. Barry
(*pro hac vice* pending)
America First Legal Foundation
Tennessee Bar No. 031963
nicholas.barry@aflegal.org
611 Pennsylvania Ave SE #231
Washington, DC 20003