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Districts Must Adhere To Safety In Youth Sports Act

On November 9, 2011, Senate Bill 200, known as the Safety In Youth Sports Act or Act 101, was signed into law by Governor Corbett. This Act requires any student athlete, who exhibits signs or symptoms of a concussion or head injury, to obtain a clearance by a licensed or certified medical professional trained in concussion before being allowed to resume playing sports. The Safety In Youth Sports Act will take effect on **July 1, 2012**. The following is a list of rules and regulations that each school district should understand and ensure that all administration and employees of the district are fully aware of such statutory regulations.

The first question is: who is a trained medical professional? Under the new law, a trained medical professional would be: (1) a licensed physician who is trained in the evaluation and management of concussions; (2) a certified healthcare professional trained in the evaluation and management of concussions; and (3) a licensed psychologist, neuro-psychologically trained in the evaluation and management of concussions.

The next question that must be asked is: what is considered an athletic activity under Act 101? An athletic activity under Act 101 is considered: (1) an inter-scholastic athletic activity which would include basketball, football, wrestling, baseball, etc.; (2) an athletic contest or competition sponsored by, or associated with, a school entity, such as cheerleading; (3) a club sport sponsored by a school-affiliated organization; and (4) non-competitive cheerleading that is sponsored by a school district. The new law also includes practices, inter-school practices and scrimmages as part of its definition of athletic activity.

As part of Senate Bill 200, there were educational curriculum or educational materials that were to be developed under the Department of Health's Guidelines, and with the help of the Department of Education, to prepare relevant materials to educate students, their parents, and their coaches about the nature and risk of concussions. Prior to a student athlete's participation in an athletic activity, the parent and student will sign and return to the District an Acknowledgement of Receipt and Review of a Concussion or Traumatic Brain Injury Information Sheet developed under this section.

As a requirement of the Safety In Youth Sports Act, a district may hold informational meetings (continued next page)

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prior to the start of each athletic season regarding concussion management and create baseline assessments. Students, parents, coaches, school officials, physicians, trainers, and physical therapists are encouraged to attend such meetings. As part of the educational curriculum, a training course must be held once each school year for which a coach shall complete the concussion management certification training course offered by the Center for Disease Control and Prevention, or other provider approved by the Department of Health. A coach shall not coach an athletic activity until he or she completes this training course and is certified.

One of the priority requirements of Act 101 is the Removal From Play Requirement. This Removal From Play Requirement states that a student who, as determined by a game official, coach from student's team, certified athletic trainer, licensed physician, or licensed physical therapist, exhibits signs or symptoms of a concussion or traumatic brain injury while participating in an athletic activity, shall be removed by the coach from participation at that time. As part of this requirement, a coach shall not return a student to participation until the student is evaluated and cleared for return in writing by an appropriate medical professional. This has been deemed the Return to Play Provision of the Safety in Youth Sports Act.

Act 101 also creates additional penalties that will be implemented effective July 2012. One of the penalties for a first violation is suspension from coaching any athletic activity for the remainder of the season. A second violation is suspension from coaching any athletic activity for the remainder of the season and the next season. Finally, a third violation is a permanent suspension from coaching from all athletic activities from any school district. The coach as well as the school district must keep in mind that nothing in this Act shall be construed to create, establish, expand, reduce, contract, or eliminate any civil liability on the part of any school entity or school employee. Any coach acting in accordance with the Removal and Return to Play Provisions shall be immune from any civil liability.

Who is susceptible to a lawsuit?

Physicians, Nurses and Physician Assistants
Coaches
Athletic Trainers and Physical Therapists
School Districts
Colleges and Universities

The following is a list of ways that a school district can protect itself from litigation while ensuring that the number one concern, student safety, is upheld. School districts should inform students and athletes about concussions and traumatic brain injury management before the athletic season. School districts should create policies on Concussion and Traumatic Brain Injury evaluations immediately. These policies should include precise procedural steps for taking care to spot concussion and traumatic brain injury symptoms, include precise procedural steps for getting the student or athlete medical attention, and include precise procedural steps for the student or athlete to be released to return to play. Districts should always make sure to have proper documentation of policy provisions and ensure that procedures were followed pursuant to the policy.

In light of the recent requirements under the Safety In Youth Sports Act, it is highly recommended that all school districts consult with their solicitor to ensure the creation of proper policies and regulations for concussion management and evaluation. If the school district creates proper procedures and a guideline checklist, this will ensure that coaches, administrators, athletic trainers, and any other administrative employee of the district will know their obligation under the Safety In Youth Sports Act and be able to facilitate it as such.

Student Drug Testing at Issue Once Again

On March 21, 2012, the American Civil Liberties Union of Pennsylvania and Dechert, LLP, filed a lawsuit in State Court on behalf of a Solanco School District (Lancaster County) sixth-grader and her parents to stop the school district from requiring students who participate in extra-curricular activities, including athletic and academic competitions, to submit to suspicionless, random drug testing.

The ACLU of Pennsylvania believes the school's policy violates a 2003 Pennsylvania Supreme Court ruling requiring the schools to justify suspicionless drug testing programs with evidence of a widespread drug problem among students. This is the third lawsuit the ACLU of Pennsylvania has filed in the past 13 months against school districts with alleged unconstitutional drug testing policies. In the past year, Judges have issued injunctions to stop similar policies in two other school districts. "Not only are these policies a violation of students right to privacy, numerous studies have shown that they do not reduce student drug use," says Reggie Shuford, Executive Director of the ACLU of Pennsylvania.

Specifically, the complaint alleges that the Plaintiff is bringing suit to avoid the provisions of a school district policy that require students as young as eleven to submit to random, suspicionless urinalysis drug testing in order to participate in athletics or extracurricular activities through school, or to obtain a school parking pass, in direct contravention of Pennsylvania Supreme Court precedent and the privacy and protection of the Constitution of the Commonwealth of Pennsylvania. The Complaint alleges that the Plaintiff, a student at Swift Middle School in the Solanco School District, currently barred from participation in school activities because of her refusal to consent to this unconstitutional invasion of privacy, is entitled to an injunction against the District's continued enforcement of its unconstitutional drug testing policy.

The complaint goes on to further describe the Plaintiff as an orchestra and choir participant, one of the top math students in her class, and has requested to be in her school's Mathcounts academic competition team for the 2012-2013 school year. The complaint further alleges that the student was removed from her school's orchestra and chorus at the beginning of the 2011-2012 school year and is currently ineligible to join any school athletic or academic teams. To compete in any of these activities, the student would have to agree to Solanco's Drug Testing Policy, permitting her school to demand that she produce a urine sample for drug screening at any time throughout the school year.

On or about February 27, 2006, the Solanco School District Board of Directors adopted a Policy entitled "227.2, Drug Testing for Students in Extracurricular/ Co-Curricular Activities and Student Drivers," which states that no student will be permitted to participate in extracurricular/co-curricular activities or obtain a student parking permit unless the student consents to mandatory random drug testing under this policy. To establish this consent, students and their parents or guardians must complete a Permission Form every school year authorizing the district to collect urine samples without prior notification at any time during the school year. This Consent Form also authorizes the district to release information about drug testing results in accordance with the policy, which includes notification of the building principal and applicable coaches or advisors. The policy goes on to state that its urine testing is meant to deter the presence of the following drugs: "anabolic steroids, amphetamines, barbiturates, cocaine, codeine, depressants, heroine, marijuana, morphine, methamphetamines, opiates, PCP, stimulants, and Valium."

Finally, the policy stipulates that an individual in fact violates this policy when a urine sample tests positive for drugs, or when a student refuses to provide a urine sample for testing. Violations of the policy will result in referrals to the district's Student Assistance Program, suspensions from all covered

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Student Drug Testing

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activities and privileges, and continued drug screening.

Once the student received this drug testing Consent Form due to her registration in the orchestra and choir, the sixth-grade student in fact signed the signature line agreeing to refrain from use or possession of drugs and alcohol; however, she refused to sign the additional signature lines consenting to random mandatory drug testing and submitted this to the District. As a result of the student's refusal to consent to random testing under the policy, the student was removed from the extracurricular activities and would not be eligible to try out for any further athletic activities with the School District.

The ACLU believes that the School District must make some actual showing of the specific need for the policy and an explanation of its basis for believing that the policy would address that need, for it to pass constitutional muster. Furthermore, the ACLU of Pennsylvania cites the cases of *Theodore v. Delaware Valley School District* and *M.T. v. Panther Valley School District* as authority on these issues. The Plaintiff seeks relief in the form of an Order of Court declaring that Solanco School District Policy 227.2 violates the Plaintiff's rights under Article I, Section 8, of the Constitution of the Commonwealth of Pennsylvania and seeks a permanent injunctive relief enjoining and restraining the Defendant Solanco School District from implementing, maintaining, or enforcing such policy.

This case is currently pending; however, it is highly recommended that any school district attempting to implement a similar policy in their district should immediately contact their solicitor to allow the school district the ability to avoid any unnecessary litigation and expense.

Fifth-grader Disciplined in Crayon-drawn Threat Upheld

In a 2–1 decision by the Third Circuit United States Court of Appeals, the Court ruled that school officials could suspend a 10-year-old student over a drawing depicting an astronaut who wanted to blow up the school. The student, identified as B.C., had created other disturbing drawings and had been disciplined for misbehavior in school and at recess prior to this incident. The "blow up" remark came when students were asked to fill in a picture of an astronaut and write "wishes" or other statements. The student wrote, "Blow up the school with the teachers in it," on his artwork and showed it to several students in the class. The boy was sent to the principal's office, and he was suspended for his threatening behavior. Subsequently, his parents sued the District on First Amendment free-speech grounds.

The complaint alleges that once the teacher heard students laughing and pointing at the picture the student had drawn, the teacher approached the student and asked specifically if the student meant what he had written. At this point in time, the teacher testified that the student had a blank and serious face and this is what alerted her to send him to the Administration Office. After the Superintendent was apprised of the situation, he advised that the student should be suspended for such improper behavior.

Subsequently, the Administration met with the student's parents to inform them of the gravity of the issue and in threatening both the faculty, students and teachers with the student's "wish" drawing. At this meeting, the parents were informed in writing that the student would receive out-of-school suspension for the threat made upon the District, for which the parents, on behalf of the minor child, sued the District in Federal Court alleging that the District violated the student's First Amendment Right to

Freedom of Expression, and that the Administration imposed an excessive punishment in disciplining the student as a result of the astronaut drawing.

The Court in this case issued a legal explanation indicating that the First Amendment Rights of students in the public schools are not automatically co-extensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment. The Court also stated that student speech may be curtailed if the speech will materially and substantially interfere with the requirements of appropriate discipline in the operation of the school. The school authorities may suppress student speech to prevent material disruption in the schools, when they have more than an undifferentiated fear or apprehension of disturbance and can show that their action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.

In applying legal analysis to the facts presented in the case, the Court concluded that the astronaut drawing was seen by other students in the class and caused a student who observed the drawing to get up out of her seat and bring it to the teacher's attention. The teacher then went on to testify that she in fact perceived the observing student to be very worried about the content of that drawing. Interestingly, the Court dismissed the argument that the student was not capable of carrying out the purported threat of violence, but instead stated that the Courts had allowed wide leeway to school administrators disciplining students for writings or other conduct threatening violence. In the Court's opinion, one Judge went as far to say that the school administrators are in the best position to assess the potential for harm and act accordingly. Whether the student intended his "wish" as a joke or never intended to carry out the threat is irrelevant. School administrators might reasonably fear that, if permitted, other students might well be tempted to copy, or escalate the student's conduct, as stated by the Court. The Court went even further in suggesting that school administrators must be permitted to react quickly and decisively to address a threat of physical violence against their students, without worrying that they will have to face years of litigation, second-guessing their judgment as to whether the threat posed a real risk of substantial disturbance. The threat of substantial disruption was aggravated by the student's sharing of his "wish" with fellow students, an act reasonably perceived as an attention grabbing device.

In conclusion, the majority opinion of the Third Circuit Court of Appeals stated as one final warning that if the student's "wish" could be known by many students within the classroom then it could easily become known to a number of parents, who could reasonably view it as something other than a contribution to the marketplace of ideas within the education process. This would create a reasonable concern about the safety of their children in the present circumstances and thus, the District could reasonably conclude that the student's astronaut drawing would substantially disrupt the school environment. As a result the Court held that the decision to suspend the student was constitutional.

School districts should be aware of what amounts to a substantial disruption to the school environment and should contact their solicitor when such speech becomes known to administrators and faculty, and before any disciplinary steps are taken, and be sure to document this in-school disruption as and when it occurs.

Supreme Court Declines Religion in Public Education Appeals

On March 26, 2012, the Supreme Court declined to take up two appeals involving religion in public education.

One of the cases involved an Ohio charter school challenging a State decision that it could not use "sectarian or denominational" religious materials in its curriculum, which upended its plans to use a "Great Books" curriculum that would include the Bible, Koran, the Book of Mormon, works of Confucius, and others. The other case was an appeal from a California teacher who was ordered by administrators to remove banners from his classroom with such expressions as "In God We Trust" and "One Nation Under God."

In the Idaho case, the Nampa Classical Academy was asking the High Court to step in to its dispute with Idaho State Education Authorities over a curriculum that was to include religious text. The Academy stated in court papers that it did not seek to promote any particular religion but use a classical curriculum that relied on primary sources instead of text books that have been the subject of oversimplification and historical revisionism. The District stated that it planned to use any religious text objectively and not to inculcate sectarian doctrine or influence students' religious beliefs.

The State Board of Education initially assured the Charter School could use religious text, and the State approved a charter for the school in 2008 according to the complaints. In 2009, however, the Idaho Public Charter School Commission prohibited Nampa Academy from using religious documents and texts. The Commission relied on counsel from the State Attorney General who said the Idaho Constitution barred any sectarian or denominational materials from being used in the public school system.

The Charter School sued State officials on First Amendment Free Speech grounds. Both a Federal District Court and a panel of the U.S. Court of Appeals held that as a Charter Public School, the Academy was a political subdivision of the State and thus could not sue the State. The Circuit Panel concluded that one teacher had standing to sue but that the First Amendment does not give charter school teachers, students, or parents a right to have primary religious text included in the school curriculum. The Court stated that due to the fact that charter schools are governmental entities, the curriculum presented in such a school is not the speech of teachers, parents, or students, but that of the government itself, and the government's own speech is exempt from scrutiny under the First Amendment Speech Clause.

In Nampa Charter School District's appeal to the Supreme Court, the District stated that most schools and colleges would collect accolades for a rigorous curriculum that addressed the influence of Martin Luther King's works on the Reformation and works to biblical foundations for Herman Melville's *Moby Dick*. The District also stated that most Circuits following this Court's lead acknowledge religion's place in education and that the Establishment Clause does not prohibit a school from using religious material in an objective fashion. The United States Supreme Court declined to hear the appeal in *Nampa Classical Academy v. Goesling*, stressing that the states have the authority to set the public school curriculum.

In a second appeal, a teacher self-prescribed non-curricular classroom speech involving banners with the slogans as mentioned above, as well as "God Bless America" and "God Shed His Grace on Thee," among others, and was declined to be heard by the United States Supreme Court. The professional employee, who was a veteran calculus

teacher at a high school in the Poway Unified School District, was ordered by administrators to remove the banners from his classroom.

The teacher contended the phrases were simply patriotic sentiments and variations of language found in documents such as the Declaration of Independence. The District officials however told the teacher that he had to remove the banners because the display of the slogans without context promoted a Christian viewpoint. The teacher complied, but then sued the District under the First and Fourteenth Amendments of the United States Constitution. A Federal District Judge ruled for the teacher saying the School District had created a limited public forum for teachers to express their views and the teacher's banners communicate fundamental political messages and celebrate important American shared historical experiences.

However, the Court of Appeals said the District Court had failed to analyze the teacher's banners as speech by a government employee when rendering their decision. "Because the speech at issue owes its existence to Johnson's position as a teacher, the District acted well within constitutional limits in ordering Johnson not to speak in a manner it did not desire." In his appeal to the Supreme Court, Johnson said his case would present a good vehicle for clarifying the speech rights of teachers. But the school district argued in its brief that teachers in elementary and secondary schools have no academic freedom in their classroom speech and that there was no split in authority on that among the Federal Appeals Courts.

On March 26, 2012, the Court declined to take up the appeal in *Johnson v. Poway Unified School District* following the Court of Appeals reasoning.

As highly controversial as these cases may be, the United States Supreme Court consistently turns to the "lemon test" in implementing its decisions. The lemon test verified in the Opinion by Chief Justice Warren Berger in *Lemon v. Kurtzman* (1971) stated that the statute must have a secular legislative purpose; its principal or primary effect must be one that neither advances nor inhibits religion; and finally, the statute must not foster an excessive government entanglement with religion.

School districts must understand the basis for excessive entanglement, as well as viewpoint neutrality, in order to implement proper policies and regulations when dealing with religious First Amendment Rights in public education.

Andrews and Beard Education Law Focus

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The Firm also represents a large area of the State for coverage of school board directors through their insurance carrier.

Our legal expertise includes: Negotiation of teacher and support staff contracts; Employment Discrimination; Special Education Litigation; Veterans' Preference Litigation; Teacher and Student Discipline Hearings; and Leaders in Timed Mediation Contract Negotiations.

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The Pennsylvania School Study Council (PSSC), a partnership between the Pennsylvania State University and member educational organizations, is dedicated to improving education by providing research information, professional development activities, and technical assistance to enable its members to meet current and future challenges. The PSSC offers professional development to the membership through colloquiums, workshops, study trips, consultation, publications, and customized services. For more information, visit the PSSC website, www.ed.psu.edu/pssc/ or contact the Executive Director Dr. Lawrence Wess at ljw@psu.edu.

Subsequent Issues

If you have a school law question or topic you would like to have addressed in subsequent issues of the newsletter, please send an email to:

David Andrews: *dandrews@andrewsbeard.com*
Carl P. Beard: *cbeard@andrewsbeard.com*
Patrick J. Fanelli: *pfanelli@andrewsbeard.com*
Aimee L. Willett: *awillett@andrewsbeard.com*
Elizabeth Benjamin: *ebenjamin@andrewsbeard.com*
Emily L. Bristol: *ebristol@andrewsbeard.com*
Ronald N. Repak: *rrepak@andrewsbeard.com*

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ANDREWS & BEARD
LAW OFFICES

MAIN OFFICE:
3366 Lynnwood Drive P.O. Box 1311
Altoona, PA 16603-1311
814/943-3304 FAX: 814/943-3430
www.andrewsbeard.com