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Federal District Court Tells School District to Put Cheerleader Back on Squad

The District Court for the Middle District of Pennsylvania ruled that a case involving a student's Snapchat was a First Amendment issue and granted a preliminary injunction to plaintiffs of B.L. v. Mahanoy School District. Plaintiffs sought the injunction to prevent Mahanoy Area School District from barring the student from the cheerleading squad. Finding that the case involved a First Amendment issue the Court determined the plaintiffs were entitled to the requested preliminary injunction as their claim is likely to succeed on the merits, without this relief plaintiff is a at risk of irreparable damage, equity weighs in the plaintiffs favor, and the granting of this relief is in the public interest.

The student, B.L., was dismissed from the cheerleading squad following posting a "snap" of her and a friend holding up their middle fingers with profane text written over the top of the photograph. B.L. was an honors student and the "snap" in question was posted only to a select group of friends. A coach of the squad testified that B.L.'s dismissal was in response to her use of profanity, which violated the cheerleading programs rules governing student conduct. Plaintiffs allege the schools actions violate student free speech. They requested a preliminary injunction to allow B.L. to participate in cheerleading.

Defendants argued that this case was not one which invoked the First Amendment. Additionally, they asserted that the district has the right to punish students for profane out-of-school speech, and that out-of-school speech should be treated as in-school when it is directed at the school. The Court rejected this argument on the basis that the Third Circuit has expressly stated that "a school could not punish a student for online speech merely because the speech was vulgar and reached the school."

Plaintiffs contend that the school cannot regulate a student's out-of-school speech which does

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Inside …

SUPREME COURT OVERRULES COMMONWEALTH COURT DECISION IN MILLCREEK TOWNSHIP CASE

On June 1, 2018, the Pennsylvania Supreme Court overturned the Commonwealth Court Decision in the matter of the private sale of property by the *Millcreek Township School District*, Case No. 2018, WL 2448800. This particular case dealt with a situation where Millcreek Township School District sold one of their Elementary Schools for the amount of $1.1 million to a Company called VNet. Prior to negotiating a sale with VNet, the School received interest from the Montessori Regional Charter School to purchase the property. The Montessori Charter School offered to purchase the property for $1.1 million. The District rejected the offer and later sold it to VNet for the same price.

Montessori School filed a Petition to intervene in the private sale proceedings in front of the Common Pleas Court of Erie County where the Common Pleas Court approved the sale to VNet. At the Hearing, the Montessori School offered to purchase the property for $1.6 million.

Montessori appealed the Decision to the Commonwealth Court due to Montessori's longstanding interest in the property and the higher offer presented at the Hearing. Montessori argued that the Trial Court should have stopped the case and disapproved the sale to VNet. The Commonwealth Court reversed the Decision of the Common Pleas Court and instructed the Common Pleas Court to order a Public Sale of the property.

In the Pennsylvania Supreme Court Decision, the Court stated that the only constraint on the School Board's discretion is that, for private sales of School property, the School District must receive the approval of the Common Pleas Court.

The Court stated that the Common Pleas Court can review evidence that the price paid for the property is fair, reasonable and better than could be obtained at a Public Sale. These are the only factors that can be considered for the Trial Court. In addition the Supreme Court stated that the Trial Court's function is not to select the buyer or direct the School Board to conduct a Public Sale. The Court concluded that the Commonwealth Court did not have the authority to order the Public Sale and thus reversed the Commonwealth Court's Decision on the case.

The Decision in this case will have an impact on future private sales of School buildings and properties by School Districts. The Court outlined that the only job the Court has in reviewing these private sales is to determine whether the price is fair, reasonable, and is one that is better than the District would receive at a Public Sale. It is not the Court's function to second guess a School Board's reason for selling its property to one entity over another.

Pennsylvania Federal Judge Reduces Attorney Fees Related To IDEA Claim

Recently, a Pennsylvania federal court in a Memorandum Opinion in the case of AP, a minor, PT as parent and guardian of AP v. Shamokin Area School District, substantially reduced a parent's attorney's fees demand to the hourly rate charged by the District's attorney as opposed to the hourly rate charged by the Plaintiff's attorney in a special education case brought against Shamokin Area School District.

The Individual with Disabilities in Education Act (IDEA) provides for fee shifting of attorney's fees to the prevailing party. Under the IDEA, the court is vested with discretion to award reasonable attorney's fees to the parents of a disabled child who is the prevailing party. To understand who is a prevailing party, courts are required to explore the intent of the IDEA. In IDEA cases, "A prevailing party must be successful in the sense that the party has been awarded some relief by a court." Further, "Under the IDEA, a prevailing party attains a remedy that both 1) alters the legal relationship between the District and the handicapped child and, 2) fosters the purposes of the IDEA."

In the underlying case, parents brought a nine-count complaint asserting that the District had failed to provide a free appropriate public education (FAPE) by failing to convene and adequately develop multiple Individualized Education Plans (IEPs). When the student began at Shamokin Area School District, there were a variety of maladies and challenging issues for the District to face, including physical violence against teachers and aides by the student in question. When the parent filed for a Special Education Due Process Hearing, they sought payment by the District, of an Independent Educational Evaluation (IEE), payment of a speech and language evaluation, payment of a sensory processing evaluation, payment of an assistive technology evaluation, payment of a functional behavioral evaluation and an order from the Hearing Officer for the District to develop adequate IEP goals to address the student's areas of need along with all appropriate attorney's fees and costs. After two (2) days of testimony, the Hearing Officer found that the "violation proven by Petitioner in the instant case involves the School District's failure to conduct a timely re-evaluation and to fully assess the student." As a result of the Hearing Officer's decision, it became clear that Plaintiffs were the prevailing party as the Hearing Officer had awarded relief that materially altered the legal relationship between the parties in a manner which Congress sought to promote in the Statute. However, "Where a party does not succeed on all of his claims, the Court has discretion to reduce the attorney's fees award accordingly." While holding that AP's rights were violated, the Hearing Officer condensed the detailed Complaint to five (5) issues, however, the Hearing Officer found that the student was only to be awarded relief on one (1) out of the five (5) issues. Essentially, Plaintiffs were successful as to only twenty (20%) percent of their claim.

The Court was tasked with applying the relative success of Plaintiffs in their claims against the total attorney's fees requested. In fee disputes, the calculation of attorney's fees hinges upon the Lodestar Formula which requires multiplying the number of hours reasonably expended by a reasonable hourly rate. A reasonable rate is determined by "the community billing rate charged by attorneys of equivalent skill and experience performing work of similar complexity." Further, the burden is on the person applying for fees to be paid to produce satisfactory evidence that their rates are in line with the prevailing community rate based on comparable skill, experience and reputation. The Court must then consider the number of hours reasonably expended on the litigation with the discretion to exclude hours they deem excessive, redundant or otherwise unnecessary.

In the instant case, Plaintiffs initially requested an award of attorney's fees in the amount of $28,268, accounting for $281 for two (2) nights of lodging and 98.2 hours of work at a rate that was "voluntarily

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U.S. Appeals Court Says Title VII Covers Discrimination Based on Sexual Orientation

The 2nd Circuit Court of Appeals, in the case of *Zarda v. Altitude Express*, has ruled that Title VII of the Civil Rights Act of 1964 banning sex bias in the workplace also prohibits discrimination against gay employees, becoming only the second Circuit Court to do so.

The Court of Appeals, sitting en banc, said that a worker's sex is necessarily a factor in discrimination based on sexual orientation. The ruling sides with the Equal Employment Opportunity Commission, and against the Department of Justice, both of whom filed amici briefs in support of their position.

Donald Zarda, a former skydiving instructor in Long Island, alleged he was fired after telling a woman he was instructing he was gay. The woman's boyfriend complained, also alleging Zarda touched his girlfriend inappropriately. Zarda, who was killed in a BASE-jumping accident after the lawsuit was filed, was represented by his estate. The estate was backed by amici briefs from several large companies including Google, Microsoft, CBS and Viacom. A lawyer for the defendant, Altitude Express, Inc., said that while they agreed with the ruling regarding protections afforded by Title VII, they disputed that Mr. Zarda faced discrimination when he worked for the company.

Advocacy groups, along with the EEOC, have increasingly argued that sexual orientation is a function of a person's gender. Judge Robert Katzmann, in a 10-3 split, wrote on behalf of the court stating that while Congress had not sought to address gay bias in Title VII, laws "often go beyond the principle evil to cover reasonably comparable evils." When Title VII was first enacted, there were some who believed that sexual harassment was not covered by the law, but courts later interpreted Title VII to cover this comparable evil. "Because Congress could not anticipate the full spectrum of employment discrimination that would be directed at the protected categories, it falls to the courts to give effect to the broad language that Congress used," wrote Judge Katzmann.

This decision follows in the footsteps of the U.S. Circuit Court of Appeals for the 7th Circuit, who also found in April 2017 that Title VII bans gay bias in the workplace. The 7th Circuit covers the states of Illinois, Indiana, and Wisconsin; the 2nd Circuit covers the states of Connecticut, New York, and Vermont.

It is also important to note that the law in the 3rd Circuit, covering Pennsylvania, Delaware, and New Jersey, remains that Title VII does not cover discrimination based on sexual orientation. That decision has held up since it was heard in 2001 in Bibby v. Philadelphia Coca-Cola Bottling Company. Despite the 3rd Circuit Court of Appeals decision in Bibby in 2001, its application has been called into question by EEOC v. Scott, decided in November 2016 in the Western District of Pennsylvania.

Observation: Please keep in mind that some local or regional fair employment practice commissions have added additional protections that may cover sexual orientation.

A special "Thank You" to Legal Intern Shelby Gawley for her invaluable assistance in preparing articles for this edition of the Education Law Report.

School District to Put Cheerleader Back On Squad

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not create a substantial or material disruption in school. The Court agreed, citing several cases. The Supreme Court in Tinker v. Des Moines Independent Community School District held that students do not "shed their constitutional rights to freedom at the schoolhouse gate". In Bethel School District v. Fraser it was determined that schools may punish students for "vulgar, lewd, profane, or offensive speech". The Court notes that while the Supreme Court has allowed students to be punished for out-of-school speech that was reasonably suspected to trigger substantial or material disruption in-school, schools cannot punish students for out-of-school speech merely because it is lewd or profane.

The court looks to the Third District decision in J.S. v. Blue Mountain School District. Factually similar, in that case, a student was suspended for creating an online profile which mocked a teacher. The profile was made out of school. The District in J.S. argued they could regulate this speech as it was "lewd, and vulgar". The court dismissed the argument, holding that the ability of the school to punish students for that type of speech does not extend to out-of-school speech. The defense in B.L. v. Mahanoy argued that their case is not analogous to J.S. v. Blue Mountain School District because B.L. was not suspended from school. To date, the Third Circuit has not differentiated between suspensions from school and the banning of students from extracurricular activities. This Court followed suit and chose not to differentiate between the types of punishment.

The Court notes that B.L. has established she will be "unquestionably" irreparably harmed if this preliminary injunction is not granted as she is being barred from her "chief extracurricular activity on the basis of punishment of her protected speech". Additionally, the district is unlikely to suffer any harm as a result of the granting of this preliminary injunction, and the public interest is served by granting this preliminary injunction as the protection of First Amendment rights is a distinct public interest. For these reasons the Court granted the plaintiff's a preliminary injunction.

Take Away: Districts have both an Athletic Handbook and Student Code of Conduct. Administrators must use caution when attempting to discipline student athletes for their out-of-school conduct. When in doubt, Administrators should discuss the specifics of the case with their solicitor or special counsel prior to taking action that may give rise to a free speech claim.

Presentations

- Attorney Dambeck presented at the Pennsylvania School Board Solicitors Conference in State College, PA on July 13, 2018 on the topic of "Solicitor's Role in Balancing Efficient Educational Atmospheres With Student Free Speech Rights."
- Attorney Beard and Dr. David Bateman will be presenting at PSBA's Fall Conference in Hershey, PA in October of 2018 on the topic of "Top 10 Issues Board Members Need to Know About Special Education."

Commonwealth Court Won't Block Concussion Suits Against PIAA

On October 10, 2017 the Commonwealth Court of Pennsylvania, in the case of *Hites v. PIAA*, refused to block a proposed class action lawsuit over concussion-related injuries against Pennsylvania's governing body for high school sports, the PIAA. The suit was originally filed in the Lawrence County Court of Common Pleas in December of 2015 by two high school football players and one high school softball player who had experienced concussion issues related to their respective sports.

After that Court determined the case should not be tossed out at the preliminary objections phase, but rather should proceed to discovery, the PIAA lodged an interlocutory appeal with the Commonwealth Court. The PIAA's chief argument stated that because the Plaintiffs knew of the inherent risks of their respective sports, the PIAA did not owe players any duty of care.

However Judge Robert Simpson, writing for a unanimous three-judge panel of the Commonwealth Court, said dismissing the case based on an inherent risk or no duty rule would be premature. The Commonwealth Court found that the Plaintiffs were not focusing on the initial concussion or physical contact itself. Rather, Plaintiffs were alleging they suffered harm as a result of the PIAA's failure to act and pre and post-concussion negligent conduct. Plaintiffs' attorneys reiterated this position stating, "The position we've taken is there is not enough being done after the concussive injury. We hope that significant change will come about to where these kids are better protected and receive much more medical care."

But the PIAA believes that they are not in the best position to govern pre- and post-concussion symptoms and how they are treated. Dr. Robert Lombardi, Executive Director of the PIAA, stated, "We have always been a believer that the coaches, athletic trainers and school medical personnel are the best judges for the medical care of athletes and return-to-play decisions."

The lead Plaintiffs are Jonathan Hites, Kaela Zingaro and Samuel Teolis, on behalf of Domenic Teolis who is a minor. According to the lawsuit, Hites suffered a severe concussion in 2011 as a Neshannock High School freshman while attending a team football camp at Slippery Rock University. Hites suffered a brutal blow during the camp, but was told to keep playing, until he vomited on the field and lost consciousness siting on the bench, according to the lawsuit. It took him more than a year to be medically cleared, but he still experiences learning and social difficulties from the head trauma.

Kaela Zingaro suffered a concussion after striking her head on the ground as she tried to make a catch in June of 2014 while playing for Neshannock High School in a softball game. She became nauseous and dizzy, but the lawsuit alleges her coach dismissed the symptoms. That evening, she was taken to the hospital by an ambulance, where she was diagnosed with a concussion and whiplash. Though she was cleared to return to play two months later, she alleges she continues to experience headaches and trouble concentrating.

Domenic Teolis claims that he sustained multiple concussions during football practices and games as a freshman. After suffering a concussion in practice in October of 2012, Teolis played the next day against Central Valley High. Despite reporting concussive symptoms to a trainer and coaches, nothing was done until his parents took him to Children's Hospital of Pittsburgh of UPMC the same night as the game against Central Valley High.

These lawsuits are becoming increasingly common around the country as more focus is put on the medical effects of contact sports, specifically long-lasting damage from traumatic brain injury.

Initially, the PIAA said they have no duty to protect the students, the proximate cause of the injuries could not be linked to the PIAA and the Pennsylvania Safety and Youth Sports Act, which was passed shortly before or after the respective injuries, meant that the claims were outside the scope of the Court's consideration. The PIAA also argued

treatment by school and medical personnel, as an intervening factor, made it impossible to draw any specific link between injuries and the PIAA's conduct. However, Judge Simpson said the Plaintiffs have pleaded sufficient facts at this stage in the lawsuit regarding the PIAA's alleged pre- and post-concussion conduct to proceed with the claims. Judge Simpson explained while the Safety and Youth Sports Act adds certain responsibilities to school entities and school employees, it does not purport to alter any immunity which may currently exist for them. "In sum, there is no indication that the General Assembly, through enactment of the Safety and Youth Sports Act, intended to eliminate civil suits such as the suit filed by Plaintiffs here."

The lawsuit seeks to establish reliable systems for tracking and reporting concussions, requiring qualified medical personnel be present at all PIAA sanctioned practices and events, removal of athletes with apparent concussions from practices and games, education of school personnel on how to provide proper medical response to suspected concussions, and providing resources for student athletes seeking professional medical care at the time of concussion, during treatment or for post-injury monitoring. The lawsuit accuses the PIAA of negligence and wants to force the governing body to establish a medical monitoring trust fund to pay for ongoing and long-term expenses of student athletes and former student athletes in the class.

Plaintiffs say a major issue is a lack of qualified trainers at practices, which Plaintiffs described as chaotic with players of differing abilities crowding the field and making it difficult to assess player safety and health. This is in contrast to games when only the best players take the field and are watched from the sidelines by medical personnel in an organized fashion.

However, the PIAA believes the best decision-makers are coaches, parents, and other who see these injuries day-to-day-to-day and "not an association based in Mechanicsburg," according to Melissa N. Mertz, PIAA's Associate Executive Director.

The Commonwealth Court remanded the case to the Lawrence County Court of Common Pleas, where the case now continues in the discovery phase. For now, there has not been a final decision on what duty the PIAA owes to student athletes regarding pre- and post-concussion protocol, or if that duty should lie with the coaches and parents who are present daily.

IDEA Claim

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reduced from $400 per hour to $285 per hour." Plaintiffs' counsel justified this rate by explaining that he has over sixteen (16) years of experience exclusively in special education. By comparison, Defense counsel with twenty-eight (28) years of experience in special education law, billed the District at a rate of $170 per hour. The Court found that this was a more reasonable rate based on the Shamokin area and ordered Plaintiff's counsel's fees to be calculated at a rate of $170 per hour. Further, because Plaintiff only succeeded on twenty (20%) percent of the claims, the final bill should be reduced by eighty (80%) percent so that there would not be a windfall for failed claims. Taking into account the two (2) nights lodging and $400 filing fee, along with the reduction in hourly rate and eighty (80%) percent reduction in hours worked, the attorney's fees were decreased from the requested $28,468 to $3,338.80 in fees and $681 in costs.

In reducing the parent's attorney's fees, Judge Brann pulled a quote from a 3rd Circuit Court of Appeals case as follows: "A reasonable fee is one which is adequate to attract competent counsel, but which does not produce windfalls to attorneys."

Take Away: Special education litigation is expensive. If the parents would have prevailed on all five of their claims, this case could have had a different, costlier outcome.

New School Safety Measures in Act 44 of 2018 - School Safety and Security Coordinator

Enacted on June 22, 2018, Act 44 of 2018 improves current school safety funding programs to provide increased support for police, school resource officers and school psychologists. The Act also established a new grant program to help prevent, reduce and address school and community violence.

School entities should be aware that Act 44 requires chief school administrators to appoint a school administrator as the School Safety and Security Coordinator by August 31, 2018. The Coordinator will oversee all school police officers, school resource officers, school security guards and policies and procedures in the school entity and report directly to the chief school administrator.

Some of the specific duties of the Coordinator include:

- Review the school entity's policies and procedures relative to school safety and security and compliance with federal and state laws regarding school safety and security.
- Coordinate training and resources for students and staff in matters relating to situational awareness, trauma-informed education awareness, behavioral health awareness, suicide and bullying awareness, substance abuse awareness and emergency procedures and training drills, including fire, natural disaster, active shooter, hostage situation and bomb threats.
- Coordinate school safety and security assessments as necessary.
- Serve as the school entity's liaison with the School Safety and Security Committee, PDE, law enforcement and other organizations on matters of school safety and security.
- By June 30, 2019 and each June 30th thereafter, report on the school entity's current safety and security practices that identify strategies for improvement in executive session to the school entity's Board of Directors. (This report is not subject to the Right-To-Know Law)
- Coordinate a tour of the school entity's buildings and grounds biennially or when a building is first occupied or reconfigured with the law enforcement agencies and first responders that are primarily responsible for protecting and securing the school entity to discuss and coordinate school safety and security measures.

New School Code Provision Regarding Testing Water for Lead

On June 22, 2018 Governor Wolf signed House Bill 1448 (Act 39) into law that had various amendments to the Public School Code. One of those changes is adding a Section 742 to the School Code regarding testing of water for lead. Section 742 states "Beginning in the 2018-2019 school year (and every school year thereafter) school facilities where children attend school may be tested for lead levels in the drinking water and any school facility whose testing shows lead levels in excess of the maximum contaminant level goal or milligrams per liter as set by the United States Environmental Protection Agency's national primary drinking water regulations shall immediately implement a plant to ensure that no child or adult is exposed to lead contamination drinking water and that alternative sources of drinking water are made available."

Per the new amendment, if a school entity does not test lead levels under paragraph (A) above the school entity shall, at a public meeting, discuss lead issues in the schools facilities.

The new Code Section also provides that if a test of lead levels under paragraph (A) is elevated (undefined in the new code section) the level shall be reported to the Department of Education and posted on the Departments publically accessible internet website.

This has been a hot issue in the last several years. Some schools have already received inquiries from newspapers as it relates to their current practice of testing or receiving reports from the local water supplier. This is another issue that will need to be closely administered by the Administration and discussed with the Board of School Directors.

The Pennsylvania School Study Council, Penn State Law, Penn State College of Education, and the Partners of Beard Legal Group invite you to join us for

Education Law Day:
A Cafeteria of Legal Experts and Topics
Tuesday, September 25, 2018
8:30 a.m. – 4:00 p.m.
At Penn State Conference Center
University Park, Pennsylvania

Introduced by Dr. Lawrence Wess
Executive Director of the Pennsylvania School Study Council
And
David A. Moak, Dean, College of Education

Coordinated by Beard Legal Group – Speakers and topics include:
Dr. David Bateman, Author and Professor of Special Education at Shippensburg University
- Tips for Communicating With Parents

Elizabeth Benjamin, Partner and Ronald N. Repak, Partner
- Administrators Carrying Guns
- SROs/Schools Police Officers/School Security Officers - Oh My!
- Searches of Student and Staff
- Student Threats in and Out of the School Setting
- Suicide Hotline Issues

Ronald Cowell, Executive Director of Education Policy and Leadership Center
- Mr. Cowell will speak about the current education finance situation and the challenges to schools

("Ask the Solicitors" session to allow discussion on topics as requested by participants.)
The program is intended for Special Education Supervisors/Directors, Principals, Superintendents and Board Members

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For further information or to register, contact Lawrence Wess at Ljw11@psu.edu or 814-330-6312.

Directions and information will be sent to the all registrations.
Open parking is available at the Penn Stater Conference Center.

Beard Legal Group Education Law Focus

As solicitors, labor counsel and special counsel, Beard Legal Group represents more than 80 School Districts in Pennsylvania. The Firm has successfully negotiated hundreds of teacher and support staff contracts.

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

Our legal expertise includes: Solicitorship Services, Collective Bargaining – Teacher and Support Contracts, Employment Matters, Labor Arbitrations, Special Education Issues and Proceedings, Defense of Tax Assessment Appeals, PHRC/EEOC Complaints, Student Expulsion Hearings and Constitutional Issues.

About the Pennsylvania School Study Council

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 ljw11@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:

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