

ANDREWS AND BEARD

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Federal Court Upholds Right To Wear Cancer Bracelets By Students

In the recent case of *B.H. v. Easton Area School District*, the Third Circuit has reversed discipline given to students who wore “I ♥ Boobies” bracelets in support of breast cancer.

In this case, the School District’s policy prohibited “clothing imprinted with nudity, vulgarity, obscenity, profanity, and double entendre pictures or slogans.” The Assistant Principal at Easton informed students wearing bracelets with the word “Boobie” on them to have them removed. When certain students did not remove them, they were disciplined.

The Third Circuit, in a lengthy opinion, found that the wording on the bracelets was not “plainly lewd.” The Court explained that if the bracelets contained language that was “plainly lewd” the bracelets could have been banned. However, the Court, in its opinion, stated that these bracelets were not plainly lewd, and were “ambiguously lewd.” When the language is “ambiguously lewd,” then the speech can be protected if it has a political or social justification.

Also, the Court stated that the language can be banned if it can be shown to cause a substantial disruption of the educational process. However, the Court did not find such an educational disruption in this particular case.

Importantly, the Court held that it is not the discretionary function of the School District to make the determination as to what would constitute lewd language. Ultimately, the Courts will make this decision under the language of this Third Circuit case.

This decision only raises more questions that were present prior to the decision being issued. The end result from this decision is that School Districts will need to be more careful in any attempts to regulate student speech that may have any connection to a social or political cause.

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Schools Need to Re-Examine Acceptable Use Policies in Light of Recent Litigation

There have been numerous lawsuits filed over the use by faculty and students of School District internet and use of social media. Given the potential liability to School Districts in this new realm of dissemination of information, School Districts need to update their Acceptable Use Policies that address all forms of electronic communication.

For example, policies can restrict teachers from communicating with students on social media. Information on social media by faculty can be detrimental to the teacher's role as a professional educator. In addition, these policies should address the fact that teachers and administrators should not communicate with students other than through the email account of the District. In addition, policies should address the fact that instruction should not

be provided over the internet without the express approval of the School District Administration.

Additionally, policies should address the prohibition of downloading or saving student records on any computer that is not a computer owned or leased by the District server. Additionally, the policies can address having faculty and administration prohibited or severely restricted from text messaging of the students.

We have seen that many sexual harassment lawsuits have originated as a result of text messaging or improper use of social media by faculty. School Districts do not always realize that they have the ability to regulate such conduct through policies.

Random Student Drug Testing Upheld by Pennsylvania Court

A Drug Testing Policy of the Loysock Township School District was upheld in a recent ruling by the Lycoming County Court of Common Pleas. In that case, the School District's Policy applied to students who participated in extracurricular activities or had parking permits and required the submission of a consent form signed by the student and their parent/guardian in order to participate in the activities. The Policy provided for discipline for a positive test result or refusing to provide a sample, with a suspension from extracurricular activities as the punishment.

The Lycoming County Court rejected the challenge to the Policy and found that the Random Drug Testing Policy did not violate the Pennsylvania Constitution. Importantly, the Court found that the School District followed the guidelines of the prior Pennsylvania Supreme Court in *Theodore v. Delaware Valley School District*, where the Supreme Court found there must be a showing of a specific need for a Drug

Testing Policy.

In this case, the Court found that the School District had shown documentation of a drug problem through a (1) PAYS Survey Data, (2) the Drug Incident Spreadsheet, and (3) direct testimony from School personnel describing first hand experiences of students using drugs. This particular School District had gone through a process of over one year that included a committee studying the drug issue, it had solicited public input, and had even held public meetings on the issue.

The process used by the Loysock Township School District is a framework for other school districts wishing to implement random drug testing policies for students. The need to demonstrate an existing drug problem within the School District is an essential requirement under the Pennsylvania Supreme Court guidelines.

Federal Court Upholds Right of Teacher to Speak About Sex in the Classroom

In the recent case of *Young v. Pleasant Valley School District*, the Federal District Court for the Middle District of Pennsylvania upheld the right of a teacher to speak freely about sexual matters in a social studies classroom. The Court found that there was no discrimination based upon gender since the subjects were expressed equally to male and female students.

Further, the Court held that the complaint by the parents about the teacher's teaching conduct about sexual matters to the Principal were protected speech under the Free Speech Clause. The Federal Court held that the complaints of the parent were protected under the First Amendment.

In this particular case, the School District disclosed the names to the teacher of parents complaining after parents asked to keep their names confidential. The Federal Court found that this action by the School District constituted retaliation for punishing or deterring parents from the exercise of their First Amendment freedoms.

This case shows that a School District must seriously regard parent complaints when made and take the necessary precautions to maintain confidentiality as a result of the parent complaints.

School Districts should always be aware that when parent complaints are made, there is always the possibility of a subsequent lawsuit.

Failure to Stop Bullying by Another Student Held Not to be Constitutional Violation

In the case of *Morrow v. Balaski*, the Third Circuit upheld the dismissal of a complaint against the Black Hawk School District and its Assistant Principal for an alleged violation of Constitutional rights of due process for not protecting students from bullying.

In the particular case, two students had alleged that they were bullied in the form of threats, assaults, and racial intimidation by another student and her accomplice.

The School District took action with the student that caused the bullying, suspending that student from school, adjudicated the student delinquent, and ordered the student not to have any contact with the two students.

However, the student continued to bully the other students even after this action of the School District according to the allegations of the Complaint. The Third Circuit ruled that the School officials did not have a constitutional duty to protect

the bullied students from the bully because there was not a special relationship created under law between the bullied students and the School District. Further, the Court ruled that the School officials did not create or enhance a danger to the bullied students in violation of the student's constitutional rights to due process.

Importantly, the Court ruled that a School District's authority over students during a school day does not create the special type of physical custody needed to show a Constitutional violation.

In addition, the Court also held that the School District did not create or enhance a danger to the students by allowing the bullying student to return to school after her suspension. The Federal Court also found that the School District's decision to refrain from expelling the bullying student is not an affirmative act that made the students more
(continued page 5)

Commonwealth Court Upholds Financial Cap on Damages

In an important decision regarding maximum liability of School Districts in litigation, the Commonwealth Court this summer upheld the statutory cap of the Political Subdivision Tort Claims Act of \$500,000.

In the case of *Zauflik v. Pennsbury School District*, the Court overturned a verdict of \$14,000,000 and reduced the verdict to \$500,000 to reflect the statutory cap in the Tort Claims Act.

In that case, a school bus owned by the Pennsbury School District struck and injured Ashley Zauflik. Zauflik suffered severe injuries which resulted in an above-the-knee amputation of her left leg.

After the trial court reduced the \$14,000,000 verdict to \$500,000, Zauflik appealed the decision arguing that the statutory cap on damages was unconstitutional. Fortunately, for School Districts, the Commonwealth Court ruled that it was the role of the Legislature, not the Court, to make these types of difficult policy decisions and the Court was constrained by prior case law to mold the verdict to \$500,000 as provided by the Tort Claims Act.

U.S. Supreme Court Addresses Same-Sex Marriage

In a case decided this summer, the United States Supreme Court addressed same-sex marriage in the case of *U.S. v. Windsor*, and found that the definition of marriage as only between a man and a woman under the Defense of Marriage Act was unconstitutional.

In the *Windsor* case, a same-sex couple that was married in the State of New York, which permits same-sex marriage, had one of the persons die and

left the entire estate to the other. The remaining spouse sought the federal estate tax exemption for surviving spouses under federal law, but was unable to receive the exemption because of the Defense of Marriage Act.

The United States Supreme Court stated that the Federal Government was prohibited from discriminating against same-sex couples who were legally married in states that recognize same-sex marriage.

However, the United States Supreme Court did not address whether state laws that prohibit same-sex marriage are unconstitutional. Pennsylvania has specific laws that prohibit same-sex marriage, and even has a law that Pennsylvania does not recognize marriages from other states that would not be recognized under the laws of the State of Pennsylvania.

Consequently, for example, since Pennsylvania does not recognize same-sex marriage, a School District does not need to grant FMLA leave to an individual alleging to have a same-sex marriage or even a domestic partner.

Nevertheless, there is no prohibition against a School District granting rights through policy or a collective bargaining agreement to same-sex couples or domestic partners. In fact, several School Districts in Pennsylvania have voluntarily, even through collective bargaining with its Unions, or through promulgation of a policy, granted benefits such as health insurance and life insurance to same-sex couples or domestic partners.

Currently there is no outstanding legal challenge in any appellate court on the same-sex marriage issue in Pennsylvania; however, it can be expected that such a challenge will arise in the near future.

Breastfeeding Protected Under Pregnancy Discrimination Laws

The Federal Court for the Fifth Circuit has held that discharging a female employee because she is lactating or expressing milk constitutes sex discrimination and violation of Title VII, and that lactating and breastfeeding are related medical conditions under the Pregnancy Discrimination Act. In the case of *EEOC v. Houston Funding*, the employee spoke with her Supervisor about her need to take an extended leave after the birth of her child because she was breastfeeding. The employee also asked her employer if she could use a breast pump when she returned to work. When the employee was ready to return to work, her employer informed her that her job had been filled and she had been terminated. The employee had asked her employer if she could pump breast milk at work in a back room upon her release to return to work; however, when this request was made, she was told there was no job for her to return.

The Fifth Circuit specifically found that the employer committed sexual discrimination in violation of Title VII in this case because these factors of breastfeeding and lactating “clearly impose upon women a burden that male employees need not — indeed, could not — suffer.”

Thus, this decision sends a message to School Districts that if an employee returns following the birth of a child and an accommodation can be made for the pumping of breast milk at certain times so as not to interfere with the employee’s ability to perform the essential functions of the job, the School District must consider such an accommodation.

Failure to Stop Bullying

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vulnerable in violation of their Constitutional rights.

This decision is supportive to School Districts in showing that Federal Courts are reluctant to intervene in disciplinary decisions of the School Districts when an allegation of violation of Federal Constitution rights is alleged.

Andrews and Beard Education Law Focus

As solicitors, labor counsel and special counsel, Andrews and Beard represents more than 100 School Districts in Pennsylvania. The Firm has successfully negotiated hundreds of teacher and support staff contracts. Andrews and Beard is also one of the first firms in the state to pioneer Timed Mediation to successfully negotiate teacher-union contracts in a 48-hour process. This process can result in the settlement of the contract six months before expiration, at a large financial savings to the School District.

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.

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 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
 Elizabeth Benjamin: ebenjamin@andrewsbeard.com
 Ronald N. Repak: rrepak@andrewsbeard.com
 Brendan J. Moran: bmoran@andrewsbeard.com

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& 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