

A.I.: Friend or Foe?

Artificial Intelligence (A.I.) is an advanced intersectional technology that encompasses a broad category of mechanical simulations that recreate human intelligence and logic processes. In simplified terms, A.I. often refers to a computer system programmed to perform a task typically performed by a human that requires an educated judgment. In this regard, A.I. has an unparalleled efficiency for certain tasks, as it is capable of performing tens of thousands of analytical assessments to a mathematical certainty within fractions of seconds. This type of technology has facilitated advancement in nearly every industrial sector, while also providing utility, convenience, or security in the lives of the average person. However, the rapid expansion of the technology has also created greater opportunity for abuse as A.I. can be misused as a work avoidance mechanism that diminishes an individual's development or maintenance of critical skills. One form of A.I. that presents extraordinary potential for this type of abuse is the recent release of "Chat Bot" technology—but the issue is only apparent upon closer scrutiny.

A Chat Bot program is an A.I. designed for text-based interaction with a user, who is capable of processing language and generating responses based upon the questions, comments, or instructions provided by the user. In generating its responses, the A.I. relies upon algorithmic logic designed to emulate human intelligence, while also having access to all the information available on the Internet, as well as the processing power to absorb and synthesize that information in mere moments. The potential for this type of technology to be a valuable resource is apparent, as is its potential for misuse.

One of the founding fathers and pioneers of

A.I. (James Hinton) believes within the next twenty (20) plus years this could lead to "General Artificial Intelligence" which means the A.I. can develop and morph exponentially on its own.

For example, Chat Bots are currently more akin to prototypes than an established and refined technology, as ongoing public experimentation with the technology continues to reveal flaws. Specifically, the technology can be manipulated into accepting misinformation as genuine and subsequently utilizing that misinformation to produce propaganda, based on either individual user inputs or algorithmic errors. Another example is a Chat Bot user could not only instruct the Chat Bot to write an essay on a subject, but also actively attempt to conceal the fact it was written by a Chat Bot by including additional parameters, such as the essay must: (1) include eight spelling errors, (2) avoid using complex language or sentence structure, or (3) not capitalize proper nouns. These issues are particularly pronounced in an educational setting in the context of both students and professionals. In general, children or students tend to be more prone to underappreciate education and dismissive of associated tasks that may seem cumbersome, tedious, or mundane. Accordingly, there is a substantial temptation to utilize a Chat Bot

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as a “short cut” to avoid perceived tedium in favor of a leisure activity. Similarly, a well-meaning educator could use a Chat Bot to produce an informational student handout, gain information on an unfamiliar subject they lack time to individually research, or create lesson plans on a new subject—which could be critically flawed if the program is used to replace their judgment and not otherwise thoroughly vetted. These types of issues have resulted in a circuitous issue, which is A.I. Chat Bots can be abused to perform work expected of an individual. Other A.I. programs were developed to recognize A.I. Chat Bot (AICB) trends to determine if a particular text was written by an AICB, and the AICB will then use that information to improve their A.I. Thus, this scenario represents a definitive issue with only a speculative solution, as an effective practical solution is elusive due to deficiencies related to detection and enforcement.

To be clear, despite the potential for misuse, the A.I. technology underlying Chat Bots seem poised to be one of the next paradigmatic technologies once refined and represents an extraordinary resource when used appropriately and approached critically.

NOTE: This is one of several articles that will be featured in the BLG Education Law Report while established and startup companies further develop and refine A.I.

Private Facebook Post Leads to Dismissal of Public Sector Employee

In *Vallecorsa v. Allegheny County et al*, 2:19-CV-1496-NR (W.D. Pa. 2022), Natalie Vallecorsa (“Vallecorsa”) filed a complaint against Allegheny County for violation of her First Amendment rights following her dismissal. Vallecorsa served as a telecommunication officer for the Allegheny County Department of Emergency Services (“Employer”) where she performed emergency dispatch services. She was dismissed primarily as

a result of social media commentary published on her private Facebook profile—that had been screen-captured (photographed), spread to the general public, and forwarded to her Employer. Vallecorsa’s Employer was readily identifiable from her Facebook biographical information.

Vallecorsa’s commentary at issue involved the shooting of Antwon Rose and the subsequent public outrage when a video of the events circulated on social media. Antwon Rose was a Black seventeen-year-old individual who was shot and killed by police on June 19, 2018 while attempting to flee a traffic stop in East Pittsburgh. This ignited an immense public outcry as protests and demonstrations spread locally, displays of solidarity took place nationwide, and the subject dominated public discourse.

On June 24, 2018, Vallecorsa engaged in a conversation on Facebook addressing the protests for justice for Antwon Rose. The following is the social media interaction at issue:

[Person 1]: Still trying to figure out where all these protesters were When officer Shaw was killed in new ken.... not a peep tho!!!!

Ms. Vallecorsa: It's a joke. #backtheblue

[Person 2]: Honestly why don't they arrest them all or shut off their food stamp cards. this is seriously ridiculous.if he was innocent then why run

Ms. Vallecorsa: Thankkkk you!!! So innocent that he had an empty chamber on him && was doing community service hours for something he did prior! [thoughtful emoji]

[Person 2]: Natalie Vallecorsa right! If his ass would've stayed planted nobody would've been blocking traffic or rioting and this wouldn't exist.this generation has a lot to learn about what's right and what's wrong, the entire country has everything twisted on how to look at things and honestly I'm tired of surrounding myself with such people [sad face emoji]

Ms. Vallecorsa: [100 emoji, 100 emoji, 100 emoji] couldn't agree anymore!

[Person 2]: Natalie Vallecorsa the assistance they receive monthly will now pay what the city will be forced to pay from the loss because of rioting.cut their support and the rioting ends [smile face emoji]

The Employer was affected by an immense internal and external outcry immediately. Mere hours after this conversation was tagged to the Emergency Services’ Community Facebook Page, Vallecorsa’s supervisor began receiving staff emails expressing their concern about working alongside “racist coworkers” and advising that the comments

were circulating on social media. Moreover, several dispatchers indicated they were concerned for their safety as Vallecorsa's exchange became widespread and public backlash intensified. The Department then directly received the public's ire through numerous complaints. The general sentiment amongst these complaints was outrage and institutional mistrust as individuals indicated their concern race would be a factor in the type of response an emergency call would receive from the Department. Meanwhile, one complainant indicated their intent to organize a protest at the dispatch office, which prompted management to undertake risk management procedures in preparation for imminent disruptions that would inhibit the Department's ability to respond to emergency aid requests.

Following a Loudermill hearing, Vallecorsa was dismissed from employment for violation of several policies, including "Conduct Unbecoming an Employee," defined (in relevant part) as "any conduct which adversely affects the morale or efficiency of the Department or which has the tendency to destroy public respect for employees... or to diminish confidence in the operations of the Department." Based on the foregoing events, Vallecorsa's conduct was firmly within the bounds of this policy, as it resulted in a substantial disruption to the workplace that both (1) undermined the Department's ability to fulfill its mission and (2) eroded public confidence in the institution.

Vallecorsa filed a claim in the Federal Court for the Western District of Pennsylvania against Allegheny County for violation of her First Amendment rights under 42 U.S.C. § 1983, as well as a claim under the Monell doctrine. The Court conducted a First Amendment analysis within the summary judgment procedural framework. The Court acknowledged that while "[a] State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech, . . . a citizen who enters government service must accept certain limitations on his or her First Amendment freedom." Thus, in order to establish a First Amendment claim, the public-sector employee must show (1) the speech was protected under the First Amendment, and (2) the speech constituted a "substantial or motivating factor" in the action. Thereafter—if the employee carries their burden—the Court shifts the burden to

the state to prove "the same action would have been taken even if the speech had not occurred."

In this case, the matter at issue is whether the employee speech falls under the First Amendment. To this end, the Court has two threshold inquiries: (1) whether the public employee is speaking as a private citizen, rather than an employee, and (2) whether the speech involves a matter of public concern. Thereafter, the Court must determine if the state had "an adequate justification for treating the employee differently than the general public based on its needs as an employer under the Pickering balancing test." The Pickering test is a totality of the circumstances inquiry in which the Court must balance the employee's interest—as a citizen, not an employee—in the ability to comment on matters of public concerns against the state interest in "promoting efficiency of the public services it performs through its employees."

The Court further delineated the inquiry by identifying factors the Court considers when applying the Pickering test. One critical factor is the abstract content, value, or importance of the speech to both the employee and the public. Another critical factor is the context or circumstances surrounding the speech. Specifically, the Court must not consider speech purely "in a vacuum," rather the Court must consider "the manner, time, and place of the employee's expression...as well as the context in which the dispute arose."

In applying this analysis, the Court determined Vallecorsa's speech is only entitled to "limited" protection—not the "highest rung" protection. The Court determined the content of the speech, race, and policing is a matter of public interest that carries value to both Vallecorsa and the public. However, the context of the speech is hardly indicative of the type of speech that receives "highest rung" protection—which is typically reserved for commentary about the government. Specifically, the speech was made by Vallecorsa on her private Facebook profile, in a private comment section, amongst her "Facebook Friends"—which the Court viewed as more of a private interaction that then became public, rather than speech in a public forum that may result in greater First Amendment protection.

The Court must then balance Vallecorsa's aforementioned interests against the state's "legitimate and countervailing interest, as an

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employer, in promoting workplace efficiency and avoiding workplace disruption.” To this end, a reasonable concern or likelihood of disruption may be sufficient, with the Court considering factors such as whether the speech has a detrimental effect on working relationships, impedes the performance of duties, or interferes with regular operations. Thus, there is no responsibility for the Employer to stand idle, or “wait and see,” if catastrophe unfolds. This consideration was immaterial in this instance as the state was able to provide evidence beyond mere concern of disruption; Vallecorsa’s speech resulted in the aforementioned actual disruption of Department business that also implicated the preceding relevant factors.

In arriving at its conclusion, the Court summarized its approach as:

In order for his or her speech to rise to the level of constitutionally protected expression, the [public] employee must speak as a citizen (and not as an employee), the speech must involve a matter of public concern, and the government must lack an adequate justification for treating the employee differently than the general public based on its needs as an employer under the Pickering balancing test...

The Pickering balancing test requires the courts to balance the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.’ This balancing test is ‘a fact intensive inquiry that requires consideration of the entire record, and must yield different results depending on the relative strengths of the issue of public concern and employer’s interest.

After balancing the identified interests, the Court concluded Vallecorsa’s interest in commenting on matters of public concern cannot overcome the state’s interest in providing unimpeded emergency services—nor its justification for her dismissal—under the Pickering balancing test. Accordingly, the Court dismissed Vallecorsa’s claim as the Court found there to be no violation of the First Amendment, as a matter of law.

Commonwealth Court Affirms District Action Furloughing Administrator

Nadia Engel (“Engel”) had served as an assistant principal within Ellwood City Area School District (“the District”) since the start of the 2014-15 school year. At the July 9, 2022 District Board Meeting, the Board decided to furlough employees—which included Engel—in accordance with the Pennsylvania School Code to address the issue of substantial student enrollment decline (approximately 7.9% District-wide). Following a Loudermill Hearing, the Board decided Engel was properly furloughed under Section 1124(a)(l) of the Code. 24 P.S. § 11-1124(a)(l).

The District’s furlough decision was between two assistant principals, both of whom had received “proficient” ratings on their two most-recent performance evaluations. Thus, the District made the decision based upon seniority, which resulted in the less-senior Engel being furloughed. As a furloughed employee, Engel maintained a possessory interest, or “right to recall,” under the Pennsylvania School Code: 24 PS 11-1125.l(d).

Shortly thereafter, an elementary principal vacancy within the District became available due to a retirement. However, the District did not use the vacancy to recall Engel, as the vacancy was for a principal position and Engel was furloughed from an assistant principal position, and the District was advised an employee cannot utilize the furlough mechanism to unilaterally obtain a promotion. Engel argued she was entitled to be recalled to the principal position because: (1) Section 1125.l(d)(2) of the Pennsylvania School Code provides “[n]o new appointment shall be made while there is such a suspended ... professional employee available who is properly certificated to fill such vacancy ...”; and (2) Engel possessed the certification qualifications for the principal position.

Engel requested a hearing before the District Board to address her concerns related to the furlough action. Engel contended the District (1) improperly or erroneously calculated the student enrollment figures used as the basis for her furlough;

(2) considered impermissible factors, such as salary, in its decision; and (3) erred by not recalling her from furlough to fill the principal vacancy. The Board rejected Engel's claims, as the claims were not only unsupported by evidence, but undermined by substantial countervailing evidence and precedent. Specifically, the Board's Adjudication contained extensive argument that prior caselaw regarding the repealed Section 1125 controlled and the legislation was not intended to create a mechanism for "promotion" through recall.

Following the Board's decision, Engel appealed to the Court of Common Pleas of Lawrence County, which affirmed the District's action, and prompted Engel to appeal to the Commonwealth Court of Pennsylvania. The Commonwealth Court similarly affirmed the District's action and exhaustively refuted Engel's claims. Specifically, the Court found the District's approach to student enrollment calculation method to be within the bounds of reason and discretion allotted to school boards. Moreover, the resulting data was comparable to analogous cases that found substantial decline in student enrollment. Second, the Court dismissed Engel's claim that the District considered impermissible factors in its furlough decision, as it was merely conjecture without any evidentiary support in the record. Third, following a statutory and etymological analysis, the Court found that Engel did not meet the furlough reinstatement litmus test, as there was no evidence that the positions of assistant principal and principal are the "same type" of position.

Furthermore, the Court also expressly considered whether the furlough recall mechanism can be utilized to obligate an employer to recall an employee with a promotion. To this end, the Court decided this function of the furlough recall mechanism is antithetical to the statute's legislative intent and "beyond the purpose" of Section 1125 of the Pennsylvania School Code "to require a professional employee to be promoted or advanced in status." Therefore, the Court concluded: "[i]n accordance with our long-standing precedent, Section 11-1125.1 of the Code is not a pathway for promotions."

While this case is an unreported decision by the Commonwealth Court, it retains persuasive authority in arbitration cases.

Note: Carl P. Beard of Beard Legal Group presided over the local agency hearing as the District's Hearing Officer and developed the Adjudication Decision that was ultimately upheld by the Lawrence County Court of Common Pleas and Commonwealth Court of Pennsylvania.



Jennifer L. Dambeck, Esquire

Beard Legal Group PC is proud to announce that Jennifer L. Dambeck is now a Partner with the Firm.

Attorney Dambeck has been with Beard Legal Group for over 7 years concentrating her practice in the areas of labor and employment law and education law.

As well as representing several school districts in regularly scheduled board meetings and researching and providing opinions on timely topics for our school clients, Attorney Dambeck also handles various litigation issues as Defense Counsel on the insurance panels to which Beard Legal Group has been appointed.

Attorney Dambeck has been a guest lecturer at Pennsylvania School Board Association Solicitors' Symposium, Council of School Attorneys, and Blair County School Nurse Association.

In addition, Attorney Dambeck has volunteered as a Mock Trial Attorney Coach and serves as a Pro Bono Mediator for Blair County to help ease Court scheduling of cases.



Beard Legal Group PC Speaking Engagements

- Attorney Jennifer Dambeck presented to the Blair County School Nurses on January 16, 2023 providing a School Law Update.
- Attorney Elizabeth Benjamin presented on January 23, 2023 on Title IX Investigations; and on February 23, 2023, Attorney Benjamin presented jointly with the Cumberland Valley School District Human Resource Development at the PASPA conference on “How to Hold Employees Accountable through A Legal Lens”.
- Attorney Carl P. Beard recently presented on March 10, 2023, at the Western PA Curriculum Leadership Summit held at the Community College of Beaver County. Attorney Beard also spoke on behalf of the CSIU Administrative Law Series on February 13, 2023 on “Social Media – Covering problems with students and teacher and what every administrator should know regarding social media and its impact on schools.”
- Attorney Carl P. Beard has again been asked to speak at the Sam Francis School Law Symposium on June 21, 2023.

In addition to regional conferences, Beard Legal Group’s attorneys have provided presentations directly to school districts on topics including, but not limited to, Title IX Investigations, Student Discipline Procedures, Employee Evaluations and Professional Duties and Expectations.



Beard Legal Group is again partnering with the Pennsylvania School Study Council, Penn State Law, Penn State College of Education to provide a day-long Education Law Symposium.

This Symposium will be held **Tuesday, September 19, 2023.**

The in-person conference will be held at the Appalachia Intermediate Unit 8 Training Center in Altoona Pennsylvania with the option to participate remotely.

Additional information will be forthcoming.

Beard Legal Group Education Law Report

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 carriers.

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. Peggy Schooling mxs284@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:

Carl P. Beard* cbeard@beardlegalgroup.com
 Elizabeth Benjamin* ebenjamin@beardlegalgroup.com
 Jennifer L. Dambeck* jdambek@beardlegalgroup.com
 Carl Deren Beard cdbeard@beardlegalgroup.com
 Krystal T. Edwards kedwards@beardlegalgroup.com
 Joseph D. Beard jbeard@beardlegalgroup.com

*Partner

The information contained in the *Education Law Report* is for the general knowledge of our readers. The *Report* is not designed to be and should not be used as the sole source of legal information for analyzing and resolving legal problems. Consult with legal counsel regarding specific situations.

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BEARD
LEGAL GROUP

MAIN OFFICE:

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