BEARD LEGAL GROUP
EDUCATION LAW REPORT
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Federal Court Rules School District Must Open Its Doors to After-School Satan Club

The Satanic Temple ("the Temple") filed a lawsuit against the Saucon Valley School District ("the District") in the Federal District Court: Eastern District of Pennsylvania alleging unconstitutional discrimination and violation of the U.S. Constitution's Establishment and Free Exercise Clauses of the First Amendment, as well as the Pennsylvania Constitution's equivalent provision. These allegations arise from the District's approval of an After School Satan Club, and subsequent revocation, which the Temple asserts was rescinded on a discriminatory or pretextual basis. To support these claims, the Temple juxtaposed the District's approach to the Temple's After School Program and its approach to other organizations—including one sponsored by Christian organizations. As of May 1, 2023, the Temple succeeded in attaining a preliminary injunction to enjoin the District from preventing the Temple from conducting its after-school events on the dates the District originally approved.

The Temple explored the creation of an After School Satan Club within the District at the request of an interested District parent. Accordingly, the Temple sought access to District facilities "to provide young people with an alternative to other religious clubs that meet on campus after school" and express the Temple's viewpoint of: (1) the "Seven Satanic Virtues: benevolence, empathy, critical thinking, creative expression, personal sovereignty, compassion, and the pursuit of justice"; and (2) clarify the Temple "does not worship Satan," but rather regards "Satan… as a literary figure who represents a metaphorical construct of rejecting tyranny, championing the human mind and spirit, and seeking justice and egalitarianism for all."

As a result of the parent's interest, the Temple submitted the required application materials to the District on February 2, 2023, to host events on March 8, April 12, and May 10, 2023. The Temple complied with the District's requirements and received notice of the District's approval on February 16. Accordingly, the Temple began preparations for its After School Satan Club. In the past, the District had distributed informational materials or permission slips to students for organizations, which prompted the Temple to prepare such materials—all of which included an express disclaimer indicating the After School Satan Club "…is not an activity of the school or the School District." However, none of the Temple's materials would be distributed, as the District informed the Temple past instances of such practice were made by prior administrations, in error, or otherwise violated policy.

Thereafter, the District proactively explained their approval of the After School Satan Club in a District-wide community email and a now-deleted Facebook post on February 20, 2023—which stressed the District approved the Temple's

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application because the District is required to do so by law, given their past actions of opening its facilities to external organizations. Following this announcement, the District received local backlash, numerous complaints, and fervent local media attention, which included a statement from the School Board President, which indicated she was "not convinced" the Temple would be utilizing District facilities and the Temple's approved application was actually still under District review. Furthermore, the District received an anonymous threat regarding the situation, which prompted the District to close District facilities on February 21st and 22nd while law enforcement investigated the matter. Thereafter, the Superintendent informed the community that, "due to this disruption and threat to the safety and welfare of our students and staff, I will be recommending a full review of the Satan Club's use of our facility," which was followed by the District rescinding its approval two days later on February 24, 2023.

Also on February 24, the District informed the community of its decision to revoke its approval of the Temple's application for failure to comply with Board Policy 707. On the same day, the District also informed the Temple the reason for revocation was "advertisements shared on social media for the Club on February 20, 2023" that "did not comply with Board Policy 707," which requires an express disclaimer that the activities "are not being sponsored by the school district." The district correspondence affirmed the Temple's inclusion of a disclaimer, however, the District claimed it was "nearly illegible" and asserted "other parts of the flyer…strongly suggest the Club was…sponsored by the District." The District's correspondence continued to attribute the aforementioned disruption on February 21 and 22 to the Temple's advertisement choice.

However, the Temple did not create the February 20, 2023, advertisement referenced in the District's correspondence. The advertisement referenced appears to be a Facebook post from a District parent, unaffiliated with the Temple, which included a copy of the Temple's permission slip. Otherwise, the Temple's lone advertisement of the events occurred immediately after the District informed the Temple it would not distribute informational materials. This advertisement occurred on February 18 on the Temple's Facebook page, in which the Temple posted its permission slip for the events alongside two other permission slips for After School Satan Programs launching in Colorado and Virginia.

The permission slip included the disclaimer and otherwise stated, "SPONSORED BY: THE SATANIC TEMPLE AND REASON ALLIANCE," while also providing the Temple's contact information, access to resources for more information, and a QR Code for the Temple's After School Satan Club brochure. Moreover, any symbols of logos affiliated with the District were notably absent from the permission slip, as the District seemed to appear only as a reference point for the location of the events.

Following the District's revocation, the Temple investigated the District's practices related to District facilities usage by external organizations. As a result, the Temple claimed the District has an uneven application of Policy 707, and arbitrarily enforced its requirements on the Temple—despite the Temple being (arguably) the most compliant organization with the policy. To this end, the Temple provided a myriad of instances of seemingly uneven application of Policy 707. For example, other organizations either did not include any disclaimer on their materials, or such disclaimer was "nearly identical," but those organizations were not rejected under Policy 707. The Temple emphasized this occurrence in relation to The Good News Club, which is a Christian-affiliated organization, which did not have any disclaimer on their permission slip until March 1, 2023—approximately a week after the District rescinded their approval for the Temple's After School Satan Club. Thus, the District appeared to give The Good News Club the opportunity to revise their materials to comply with Policy 707 after over a year of noncompliance—but did not allot the same opportunity to the Temple.

Similarly, the District did not consider The Good News Club's advertisements including the District's location, which were similar to The Temple's advertisement and permission slip, to be an invocation of District sponsorship. Furthermore, the Temple emphasized the District's history of distributing

informational materials for no less than five other organizations' after-school programs. However, the District discontinued the practice of distributing materials prior to the Temple's application. Unaware of the prior discontinuation, the Temple contended the District's selective distribution was evidence of discrimination based upon the District's divergent treatment of similarly-situated organizations, with no meaningful distinction between such organizations other than their viewpoints or perceived viewpoints.

Furthermore, the Temple argued the District's revocation on the basis of a substantial disruption is no more than a flawed attempt to cover its pretextual or discriminatory revocation. To this end, the Temple explains the fundamental attribution error in the District's substantial disruption justification. Specifically, the Temple's mere existence and exercise of its rights cannot be responsible for the February 21st and 22nd disruption brought about by the criminality of an unrelated third-party, and, as such, would be tantamount to an unconstitutional "heckler's veto." Moreover, there is no evidence the Temple's advertisement, as opposed to the District's own announcement, even reached the individual responsible for the disruption.

The Federal District Court for the Eastern District of Pennsylvania was persuaded by several of the Temple's arguments, which resulted in the Court granting a preliminary injunction—which is considered an "extraordinary" remedy to be granted in narrow or "limited" circumstances." *Holland v. Rosen*, 895 F.3d 272, 285 (3d Cir. 2018). When considering a preliminary injunction, the Court outlined it considers the following four (4) criteria:

1. whether the moving party has shown a reasonable probability of success on the merits;
2. whether the moving party would be irreparably injured by denial of the preliminary relief requested;
3. whether granting the preliminary relief would result in even greater harm to the non-moving party; and
4. whether granting the preliminary relief was in the public interest.

Jackson Hewitt Inc. v. Madan, 83 Fed. Appx. 417, 419 (3d Cir. 2003).

Previous editions of the Education Law Report have extensively addressed the applicable caselaw regarding the Equal Access Act and what impact occurs when a District creates an "open" or "limited open" forum for speech. While school districts "have no obligation to open its facilities to expressive activity by outsiders" *Gregoire v. Centennial School Dist.*, 907 F.2d 1366, 1370 (3d Cir. 1990), once a school district opens its facilities to outsiders, it has created either a "designated" or "limited" public forum for expression protected by the First Amendment which does not permit suppression of speech based merely upon a "desire to avoid the discomfort and unpleasantness that always accompanies an unpopular viewpoint." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393, U.S. 503, 509 (1969).

In examining the record in this case, the Court concluded the District created some form of a public forum by opening its facilities, which beholds the District to the protective restrictions provided by the First Amendment. The Court also concluded the "substantial disruption" test created by Tinker is not applicable as a justification under current precedent, as the test focuses upon student speech and has only ever been applied to such speech.

In granting the Preliminary Injunction, the Court stated "the government's first instinct must be to forward expression rather than quash it. Particularly when the content is controversial or inconvenient. Nothing less is consistent with the expressed purpose of American government to secure the core, innate rights of its people." The Court further emphasized this concept, quoting the Third Circuit Court of Appeals: "[t]he government may not regulate speech when the specific ideology, opinion, or perspective of the speaker is the rationale for the restriction." Therefore, the Court determined the Temple's expression regarding the aforementioned "Seven Satanic Virtues" and Satan as a metaphorical device amount to expression of "a constitutionally-protected viewpoint on religion and philosophy."

Practice Note: When faced with requests to create clubs that may appear on their face to be controversial, the District should consult with its Solicitor or Special Counsel before granting or denying a request to create an "after school" club to ensure it does not run afoul of the Equal Access Act or First Amendment.

The Dangerous Games We Play

Teenagers in several states have been playing a game, colloquially known as, "the Assassin Game," which in its simplest form is a "water gun fight" in which the participants are always playing until they are eliminated. These rules mean that there is no restriction on when, where, or how a participant may be engaged in the Assassin game. As a result, teenagers have hidden in the backseats of cars, around corners, outside homes, inside lockers or closets, and various other places to ambush other participants with a tactical advantage.

Initially, one's reaction might be to sigh exasperatedly at a nuisance, but the Assassin Game presents a much graver risk than a whimsical water gun fight. The major issue is that participants are not using comically vibrant water guns that could not reasonably be mistaken for a real firearm. Instead, participants are opting for water guns with the appearance of a real firearm, which are liable to prompt any number of undesirable outcomes—with some consequences much graver than others. For example, an observer may mistake the teenager for an armed assailant and respond with deadly force, or alert law enforcement who will respond to the situation and possibly react in such a fashion perceiving it to be a life-threatening situation. The practical reality of this type of risk is compounded by the growing prominence of mistaken "stand your ground" situations, in which an individual is shot when mistaken as an intruder or threat.

The issues presented by the Assassin Game are not an amorphous "somewhere else" problem. Recently, a Pennsylvania School District and local police issued a joint statement on the subject, stressing the aforementioned concerns to parents and imploring them to prohibit their children from participation in this game that could have serious consequences for the participants and possible bystanders.

Practice Note: School districts should undertake proactive measures in collaboration with local police authorities to educate parents and students about the dangers/inherent risks of participating in such activities.

Court Says Music in the Workplace Can Create a Hostile Work Environment

The Ninth Circuit Court of Appeals recently addressed the issue of playing music with sexually derogatory and violent content in the workplace in *Sharp v. S&S Activewear*, L.L.C., 21-17138, 2023 WL 3857491 (9th Cir. June 7, 2023).

Apparel manufacturer, S&S Activewear, allegedly allowed its managers and employees to regularly play "sexually graphic, violently misogynistic" music in their Nevada warehouse. Blasted from commercial-strength speakers that overpowered the operational background noise in the 700,000 square foot warehouse, were songs like "Blowjob Betty" that "glorified prostitution" and "Stan" by Eminem that detailed extreme violence against women by stuffing a pregnant woman into a car trunk and drowning her. The employees even had speakers on forklifts and would drive around the warehouse playing songs that degraded women and used offensive terms like "hos" and "bitches," making it impossible to avoid listening to such music.

In turn, the music allegedly encouraged male employees at the warehouse to make sexual gestures and remarks, and even share pornographic videos. Although the music was mostly demeaning toward women, who comprised half of S&S Activewear's warehouse employees, males also took offense. Despite "almost daily" complaints, management defended the music as motivational and continued playing such music for two years, up until this suit.

Eight former employees of S&S Activewear, comprising of seven women and one man, filed suit alleging that the music and associated conduct created a hostile work environment in violation of Title VII. The District Court granted S&S Activewear's motion to dismiss, reasoning that a hostile work environment was not created because the music was offensive to both men and women; therefore no discrimination was because of sex. On appeal, the Ninth Circuit concluded that the District Court improperly dismissed the claim by disregarding the core principles

of Title VII.

Repeated exposure to sexually derogatory and violently misogynistic music throughout the workplace can create a hostile work environment

When plaintiffs bring a hostile work environment claim, they must show that they are in a protected group and that the employer discriminated against them for being in the protected group. Next, the offensive conduct must be "sufficiently severe or pervasive to alter the conditions of employment." The Ninth Circuit has held previously that hostile conduct is found if the conduct makes it difficult for employees to do their job, take pride in their work, and stay in their employment position, essentially polluting the workplace. Sister circuit courts have found that when employees commonly and indiscriminately use slurs like "bitches" and "whores," that creates an inherent feeling of embarrassment and degradation and, as such, can lead to a hostile work environment in violation of Title VII.

It is important to note that workplace conduct should be viewed in the aggregate and circumstantially, and isolated incidents will not amount to discrimination. However, the U.S. Supreme Court has held that "repeated and prolonged exposure to sexually foul and abusive music" is auditory harassment that can pollute a workplace and violate Title VII.

Here, the Ninth Circuit found that the music at S&S Activewear was likely "more than offhand foul comments" as it was impossible to escape from hearing and allegedly created an accepted culture of derogatory behavior towards women. Thus, the Ninth Circuit found that the Plaintiffs did state a plausible claim for a hostile work environment. Both men and women can be plaintiffs in the same claim for sexual harassment

The Ninth Circuit also rebuffed the District Court's reasoning that S&S Activewear's conduct did not constitute discrimination because of sex since both men and women were offended by the music. The Ninth Circuit noted that the "Supreme Court has made it clear that it's no defense for an employer to say it discriminates against both men and women because of sex." Rather, instead of avoiding one sexual harassment suit, the employer doubles it. The Ninth Circuit further noted that the U.S. Supreme Court had previously reasoned that "harassing both men and women cannot cure bad conduct and does not rule out the possibility that both men and women have viable claims against their employer for sexual harassment."

Here, the Ninth Circuit found that S&S Activewear's arguments centered on an "equal opportunity harasser" defense and that "crediting such an approach would leave a gaping hole in Title VII's coverage." Moreover, "targeting a specific person is not a prerequisite for a viable claim under Title VII." Thus, the District Court erred in granting the motion to dismiss because the harassment claim is actionable, even though it offended both male and female employees.

Subsequently, the Ninth Circuit vacated the decision and remanded to the District Court to consider the sufficiency of the pleadings in light of their opinion that recognized music as harassment as a viable claim under Title VII.

Practice Note: Employers are encouraged to keep the workplace free of offensive music by revisiting anti-harassment policies to explicitly prohibit offensive music and also actively monitor the workplace environment to ensure offensive music is being kept at bay.

Revisions to the Title IX Regulations are expected in October 2023

The U.S. Department of Education announced a postponement of the new Title IX Regulations. The anticipated May release has moved to October 2023. It is anticipated that these Regulations will include sex-related eligibility criteria for male and female athletic teams. Watch for future Education Law Reports as these changes are released.

Welcome To Our Newest Attorney – Rachel E. O'Brien

Beard Legal Group is pleased to welcome Rachel E. O'Brien as an Associate Attorney.

Attorney O'Brien is a graduate of Penn State University and Penn State Law. Prior to joining Beard Legal Group, Attorney O'Brien worked for UPMC in Pittsburgh as a Contract Administrator. She has also worked as an Office Manager, Legal Assistant and Legal Intern in law offices in Lewisburg and State College.

Attorney O'Brien served as a Mediator for the Central Susquehanna Valley Mediation Center from October 2014 through January 2020 and currently serves as Treasurer for the Union County Veterans' 4th of July Parade in Lewisburg.

Attorney O'Brien will concentrate her practice in the areas of civil litigation, labor/employment and education law.

Attorney O'Brien can be reached at 814.296.2322 or **robrien@beardlegalgroup.com**

September 19, 2023 Penn State School Study Council

Beard Legal Group has again partnered with Pennsylvania State University School Study Council, Special Education Hearing Officers and Consultants for an all-day special education symposium to be held at the Altoona offices of Appalachia Intermediate Unit 8. We will keep you posted when registration opens.

Charlie Jelley: Trending Issues: A Hearing Officer's Perspective
Dr. Steven Kachmar: The Independent Evaluator
Catherine Girton: The Art of Student Services: Keep Your Friends Close and Your Solicitor Closer
Jonathan Steele: Perspective from the Other Side: A Parent Attorney's Insights into IDEA Proceedings
Carl P. Beard: Special Education Update: Everything and the Kitchen Sink
Artificial Intelligence Panel Discussion

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* *jdambeck@beardlegalgroup.com*
Carl Deren Beard *cdbeard@beardlegalgroup.com*
Krystal T. Edwards *kedwards@beardlegalgroup.com*
Joseph D. Beard *jbeard@beardlegalgroup.com*
Rachel O'Brien *robrein@beardlegalgroup.com*

*Partner

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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
beardlegalgroup.com