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Federal Court Permits Female to Participate on Middle School Wrestling Team

A Federal Judge has issued an order in the Line Mountain School District case permitting a seventh-grade girl to participate in a middle school wrestling team. Judge Matthew Brann issued a Temporary Restraining Order permitting the seventh-grade girl, A.B., to sign up for the wrestling team on the same terms as boys in the Line Mountain Middle School. The Line Mountain School District had refused to permit this female student to sign up for the wrestling team.

Judge Brann found that the seventh-grade girl would suffer irreparable harm if she was not permitted to sign up for the wrestling team and that the Plaintiff-Parents were likely to succeed on the merits of their Section 1983 constitutional claim against the school district.

The school district argued that if the girl were permitted to wrestle, it would put the coaches and boys 12-15 years old in awkward and uncomfortable positions that could result in them refusing to practice or compete. The district also argued that students, regardless of gender, have a right to be protected from undesired contact of sensual body parts from a person of the opposite sex.

The seventh-grade girl had participated in wrestling when she previously lived in Iowa, and when the girl's family moved to Line Mountain in 2012, the girl did participate in the Line Mountain youth wrestling team in the previous year, participating in every dual meet and in at least five tournaments.

Judge Brann did direct the parties after a hearing on November 21, 2013 to file proposed findings of fact and conclusions of law; however, by the time the Court makes a decision in January, the wrestling season will be well under way.

Many other school districts across Pennsylvania have permitted females to participate in wrestling teams. However, this is the first denial by a school district in a long time that has resulted in a Federal Court action.

Inside …

Court Dismisses Student Nut Allergy Lawsuit

The Federal Court in Pittsburgh has dismissed a lawsuit brought by parents of a student with a severe tree nut allergy. In this case, involving the Fox Chapel Area School District, the parents had claimed that the elementary school in Fox Chapel was wrong to have the elementary student with a nut allergy sit alone in the cafeteria. The parents had also alleged that the school district had not adequately accommodated the disabilities of the student and asked for Free and Appropriate Public Education payments to be made for the elementary student to attend a private school, Shadyside Academy.

However, Judge Arthur Schwab, writing for the Federal Court for the Western District of Pennsylvania, dismissed the entire lawsuit on a Motion for Summary Judgment and noted that the Fox Chapel Area School District had acted appropriately in dealing with the student's nut allergies. The Court emphasized that the Fox Chapel Area School District proposed approximately four Section 504 Plans in attempting to deal with the allergies of the child, and the parents rejected all of these plans.

Further, the parents had requested, based upon a letter from their physician, that their child be seated at a rectangular table, on the end, with a two-foot buffer from his fellow students seated at the same table, and that the others at the table would also need to have a nut-free lunch. The school rejected that proposal and had the student sit at a separate table, but the student had access to the other students in the lunchroom.

The Court also found that the student had not been harassed by other students and that the district had not shown any "deliberate indifference" to the situation involving the student that would constitute a basis for liability under Section 504. The Court noted that Fox Chapel Area School District worked diligently, although perhaps imperfectly, in attempting to accommodate the child's disability. The Court noted that even accepting all of the allegations of the plaintiff at face value, they did not constitute any more than mere negligence on the part of Fox Chapel Area School District, which is insufficient to make out a successful claim under Section 504 or the comparable state law.

This case illustrates the proper handling of the student with an allergy issue. Fox Chapel Area School District proposed numerous Section 504 Plans and attempted to deal with the parents with various alternatives to address the student's allergies. Fox Chapel Area School District in no way ignored the request of the parents, but could not accommodate every demand that the parents requested for accommodation. This case also illustrates the need of all school districts to not only provide appropriate Section 504 Plans, but to adequately train their employees in the administration of Section 504 Plans and the accommodation of students with disabilities.

Proposed Law to Ban Scents in Schools

State Representative Marcia Hahn wants to introduce legislation in Pennsylvania banning the use of scented products such as perfume, cologne or body spray in schools where students have allergies to fragrances.

This legislation came as a result of an incident at Freedom High School in Bethlehem this past spring where a student had a severe allergic reaction to Axe Body Spray. The student had to be taken to the hospital and now takes cyber classes. Also, eight students at a Brooklyn school were sent to the hospital in October after another child sprayed Axe Body Spray in a classroom.

The proposed legislation would be the Fragrance Free Schools Act which would mandate that school districts or joint school boards would develop a written policy banning the use of scented products if notified by a student with a related allergy. Under the legislation, the school would be required to distribute the policy with the student code of conduct and post notices of perfume prohibition at all entrances. Such a notice would not be able to identify the student under the legislation.

However, legislation would require that schools that fail to notify the students, faculty or staff about the prohibition on scented products would be responsible for medical bills should a student have an allergic reaction. The Principal at the high school where the Axe incident occurred, Freedom High School, has stated that he did not think such a ban on scented products could be policed in an effective manner in a school setting. Michael LaPorta, Principal of Freedom High School, stated that "kids who don't take showers don't want to walk around all day with body odor, so some of them will put cologne on or whatever."

Interestingly, the American Civil Liberties Union has not taken any position on such possible legislation, even though it often addresses issues of school dress codes.

SAVE THE DATE!

Andrews and Beard
Education Law Symposium
March 20, 2014
Blair County Convention Center, Altoona, Pa.
6:00 pm

Email for details and registration
to David P. Andrews at dandrews@andrewsbeard.com
or Carl P. Beard at cbeard@andrewsbeard.com

Cancer Bracelet Case Proceeds to U.S. Supreme Court

The Easton School District has proceeded to file a petition to the United States Supreme Court to ask the U.S. Supreme Court to hear the case and overturn the prior decision of the Third Circuit Court of Appeals in the "I ♥ Boobies" case.

The Easton School Board voted 7-1 to ask the Supreme Court to hear its appeal of the Third Circuit decision, which in August ruled in favor of middle school students who had been suspended for wearing bracelets stating "I ♥ Boobies."

Judge D. Brooks Smith, writing for the Third Circuit wrote that since the bracelets promoted a social issue, awareness of breast cancer, the message was protected by the First Amendment.

PSBA has argued that the decision is flawed because it strips school officials of their ability to decide what is appropriate for their students and schools.

It will be some time before the U.S. Supreme Court makes a decision on whether to hear this case.

Custodian Has Valid Claim for Age Discrimination After Furlough

A Federal Appeals Court has found a valid claim for age discrimination for a 72-year old custodial worker who was furloughed as part of budgetary reductions. In the case of *Harris v. Powhatan Cnty. Sch. Bd.,* the Fourth Circuit Court of Appeals found that there was sufficient evidence that a custodial worker had been "pressured" to retire prior to his furlough. The custodial worker had completed a form stating that he intended to return to work the following year before his job was eliminated.

Importantly, the custodial worker had stated that he was considering retiring at the end of the school year, but he wanted an issue about back-pay for unused annual leave resolved prior to his retirement. The superintendent of schools had urged the Board to eliminate the job of the custodian noting that he would not leave voluntarily without being paid for the unused annual leave. In fact, the superintendent had sent an email to the School Board stating that the custodian was "holding the Board hostage."

The Federal Appeals Court noted that at the time of the furlough of custodial positions, the School Board had eliminated custodial positions of three workers, all over the age of 70. While there were other younger workers also terminated, the Court said the maintenance employees were better comparators because they worked in the same department as the plaintiff in this case, Harris. The Court concluded that the School Board may have used age as the deciding factor in determining which positions to cut from the custodial/maintenance department.

This decision emphasizes the need for school districts to review the age of any individuals being furloughed when attempting to deal with budgetary constraint issues. School Boards need to look at all demographic factors when entering into any furlough decision.

School Bus Driver Has Valid Complaint for Name Calling

A school bus driver who was fired for not controlling students on her bus and permitting students to stand on her bus was able to proceed under a retaliation claim for complaints of sex discrimination over being called names. In the case of *Billings v. Sw. Allen Cnty. Sch.,* the Federal Court in Indiana held that when coworkers spread false rumors that a school employee had engaged in extramarital affairs and had been called names such as whore, backstabber, and other names of a sexual nature, the school district had liability for failing to adequately address those concerns.

Importantly, the female employee complained to management over these names being directed to her. The school district countered that rumors were also spread around about male colleagues. However, the Court noted that the school district did not have consistency of treatment, in that four drivers who also engaged in the same type of conduct of permitting standing on the bus and who did not lodge sexual harassment claims were not similarly terminated.

The terminated school employee did have some prior discipline problems and had been placed on probation prior to being terminated. However, the Court emphasized that no true investigation had been performed by the school human resource director or other administrators.

The Court emphasized that a sex discrimination complaint can come from slanderous rumors that are spread in the workplace in that the target of the rumors is of a particular sex.

The Court noted that unfounded rumors that a female employee is a "whore" carrying on with her coworkers or sleeping her way to the top are examples of making the workplace unbearable for the woman so harassed. The Court found that the allegations of the employee of this case fit that scenario and found a basis for retaliation complaint for the employee making complaints about the sexually harassing statements made against her.

This decision demonstrates that school districts must take any complaints of any rumors spreading in the workplace that may constitute sexual discrimination on a serious basis. This case exemplifies our recommendation that "when in doubt, investigate." A serious and thorough investigation in this case could have probably avoided liability for the school district.

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:

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