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Attorney Fees Ordered Against School District In Right-To-Know Litigation

Failure to comply with the Right-to-Know law can expose a School District to pay the attorney fees of a media entity seeking documents, under a recent decision of the Commonwealth Court in *Newspaper Holdings v. New Castle Area School District.*

In that case, the *New Castle News* attempted to learn how much the School District had paid to settle a Federal Civil Rights action that had been filed by three students over the District's dress code policy. In that case, the students had been disciplined by School officials for trying to wear patriotic patches on their school uniforms on the days leading up to the anniversary of the September 11th attacks.

Ultimately, the case was settled for $12,500. However, the District attempted to keep the terms of the settlement confidential.

The Commonwealth Court affirmed the long-standing rule that School Districts may not keep the terms of a settlement confidential involving the payment of School District funds. In addition, the Court also ordered the School District to pay $8,820 of attorneys fees incurred by the attorneys for the newspaper. The Court found that the refusal of the District was not based upon a reasonable interpretation of the law, and therefore attorney fees and litigation costs were proper to be awarded.

Judge Friedman, speaking for the Commonwealth Court, noted that "a school district may not contract away the public's right of access to public records because the purpose of access is to keep open the doors of government, to prohibit secrets, to scrutinize the actions of public officials to make public officials accountable in their use of public funds.

This case shows School Districts that not only may they not keep terms of a settlement confidential, but they must disclose the financial terms of the settlement to the news media. Although School Districts often attempt to try to keep the terms of the settlement confidential, as a public entity, a District risks the payment of the attorneys fees for the other side by failing to reveal this information.

This case also represents a trend of the Commonwealth Court in broadly interpreting the Right to Know law by awarding attorneys fees when a request for documents has been unreasonably refused. Also, in November, the Commonwealth Court awarded attorneys fees to a group of reporters across the State who had sought access to financial records maintained by the Pennsylvania Higher Education Assistance Agency. Consequently, School Districts should err on the side of revealing any financial documents that are involved in a settlement of any litigation.

Inside....

Disciplined Teacher Not Victim of Discrimination According to Federal Court

A Chemistry teacher who lost his Honors Chemistry class, was suspended for ten days and subjected to intensive supervision by the Administration, had all of his claims for race discrimination and retaliation dismissed by the Federal Court for the Eastern District of Pennsylvania in the case of *Burnett v. School District of Cheltenham Township*.

In this case, Burnett repeatedly gave low grades to large numbers of students in his Chemistry classes, compared to other sections of similar classes taught by other teachers. In fact, the Principal of the District noticed that 50% of the students in Burnett's Academic Chemistry classes had received a "D" or lower for the one term in question. Following parent and student complaints over the grading practices, the School District engaged in intensive evaluation and monitoring of the classrooms of the Plaintiff, Burnett.

In addition, the District found that his tests for non-Honors classes were too complex, in that they were the same tests he gave for his Honors classes. Ultimately, the District took away the Honors Chemistry classes from Burnett.

In addition, the District received complaints from parents and students concerning the teacher's classroom conduct. Parent allegations, corroborated by student interviews, showed that this teacher had been blowing kisses at various female students, massaging the shoulders of the female students, and playing with the headbands of female students. After a thorough investigation of these events, the District imposed a ten-day suspension on the teacher.

Burnett alleged race discrimination and retaliation as a result of the actions of the District. The Federal Court dismissed all of the claims regarding discrimination, and found that the actions of the District were appropriate.

The Plaintiff had alleged that he was a victim of discrimination in that the District did not have a set grading policy. However, the Court found that the fact that the District did not have a set grading policy did not make the District conduct discriminatory.

In addition, the teacher complained that the District did not have a set policy about returning student work, providing feedback, and the use of overhead projectors. Once again, the Court found that the District did not have to have set policies on these issues, and the District acted appropriately in its discipline of this teacher.

Importantly, the Federal Court found that there was no evidence that this teacher had been treated differently than any other teacher outside of his protected class. The Court concluded by finding no evidence of discrimination in any way by the District, and finding that the District acted appropriately in its handling of Burnett.

This decision demonstrates that the Courts will support School Districts in dealing with teachers who are not performing their jobs appropriately. This case also demonstrates the fact that this District in question was thorough in its investigation of parent and student complaints in all regards. When any court looks at such a case, the fact that the District can demonstrate a thorough investigation and corroborates allegations in many respects, will lead the Court to find for the School District.

District Not Liable for Student's Suicide at Home

The Third Circuit Court of Appeals affirmed a decision in favor of the East Penn School District and one of its Guidance Counselors following a suicide by a student at his home. Prior to the suicide, a former girlfriend of the student brought an e-mail to school stating that stories about her new boyfriend almost made him want to go out and kill himself. The School had its Guidance Counselor immediately speak with the student in question. The evidence showed that the student did not seem overly distraught, and did not seem to display any suicidal tendencies.

However, following a disagreement with his mother at home, the student hung himself. The mother proceeded to sue the School District and its Guidance Counselor, alleging a Federal Civil Rights violation under the "state created danger" doctrine. The Third Circuit Court of Appeals in this case of *Sanford v. Stiles* dismissed all charges against the School District and its Guidance Counselor.

The Court noted that the School followed its protocol for suicide referrals, and following investigation, found that the student was not at risk. The evidence showed that even after the first interview by the Guidance Counselor, she followed up with the student to determine his status. The Court noted that the primary encounter between the Guidance Counselor and the student was initiated by the Guidance Counselor, and the student repeatedly indicated that there was nothing troubling him. *(Continued page 3).*

Act 1 Ballot Deadlines Approaching

Act I provides that no later than March 13, 2007, School Boards must act on the Tax Study Commission recommendation, and adopt a tax referendum resolution authorizing a specific referendum ballot question. The Act also requires Boards to accept or reject the Tax Study Commission's recommendation prior to adopting this resolution, as well as holding an additional public hearing prior to final adoption of the resolution.

Importantly, since such a resolution would be considered a tax resolution, the Board has an obligation to advertise its intent to adopt this resolution once a week for three weeks prior to its adoption. Thus, School Boards need to be acting well in advance of the March 13 deadline in adopting a resolution and wording for its ballot question.

There is not a great deal of discretion available to School Districts when adopting the ballot question. Act 1 prescribes three options for possible specific referendum questions. These options, stated in Act 1, are as follows:

Referendum Question Option 1: "Do you favor imposing an additional ____% earned income tax? The revenue generated from the increased tax rate will be used to reduce taxes on qualified residential properties by $_____. The current earned income tax rate is _____%."

Referendum Question Option 2: "Do you favor imposing a personal income tax at ____%? The revenue generated from the tax will be used to reduce taxes on qualified residential properties by $_____."

Referendum Question Option 3: "Do you favor converting the school district's current earned income tax to a personal income tax at ___%? The revenue generated from the personal income tax will be used to reduce taxes on qualified residential property by $____and to replace the revenue from the school district's current earned income tax. The current earned income tax rate is ____%."

The question has been posed as to whether a District can modify the wording of these proposed referendum options. We believe that some modification for clarity can be done, but only within certain limits. Act 1 states:

"The referendum question submitted to the electors of the school district at the primary election of 2007 shall state the rate of the proposed income tax to be levied, the reason for the tax, the estimated per homestead tax reduction and the current rate of earned income and net profits tax levied by the school district. The question shall be clear and in language that is readily understandable by a layperson."

Some school boards have questioned whether they can switch the order of the ballot question, such that the question would start by asking voters if they would like to have the taxes on residential property reduced, followed by a statement that to do so would require an increase or levying of an earned income tax or personal income tax. To proceed in this manner has a risk, in that it does not follow the sample language provided by the Act itself, and we do not believe it is worth a lawsuit to proceed in this manner.

In any event, if Districts have not already done so, Districts must proceed on adopting its resolution and ballot question wording as soon as possible.

Student Suicide *(Continued from page 2).*

Further, the Court stressed that the Guidance Counselor did not in any way interfere with the mother's parental relationship with her son.

In finding for the School District and the Guidance Counselor, the Court also stressed that the Guidance Counselor did not simply ignore the note. To the contrary, the Guidance Counselor promptly spoke with the student upon hearing of the potential suicide threat, at which point she made a conscious judgment that indicated that he had no suicidal signs. The Court explained that this judgment was influenced by the fact that the student had assured the Guidance Counselor that he was no longer upset about the issue with his former girlfriend and that he was proceeding with future plans.

The Federal Court noted the heavy burden on the Plaintiffs to sue in this type of case and found that the court would need to find evidence that the School District "shocked the conscience" by its conduct and the handling of the matter. To the contrary, the Court found that the District acted in an appropriate manner in its dealing with the situation.

This decision confirms that a School District must react when there is any potential statement regarding suicide. The District in this case acted entirely appropriately in immediately having its Guidance Counselor conduct an investigation and interview the student in question. However, the Court found correctly that the District cannot be responsible for a suicide occurring offsite, unrelated to any actions by the District or its Guidance Counselor.

Single Sex Classes May Be Offered At Public Schools If Certain Conditions Are Met

On November 24, 2006, final regulations from the U.S. Department of Education became effective regarding single-sex classes. Under the final Regulations, a public school district may offer a single-sex class as long as four conditions are met:

1) School District must be able to show that an important objective is being met by offering a single-sex class.
2) The District must implement the objective even handedly.
3) Student enrollment in the single-sex class must be completely voluntary.
4) The District must offer substantially co-educational classes in the same subject to all other students including students of the excluded sex.

According to the final regulations, the two most important objectives may be 1) to improve the educational achievement through an overall established policy to provide diverse educational opportunities; or 2) to meet the particular identified educational needs of students, provided that the single-sex nature of the class is substantially related to achieving that objective.

School Districts need to be aware that the U.S. Department of Education changed the language of the diversity objective to state that offering single-sex classes must be part of an "overall established policy to provide diverse educational opportunities." Merely offering a single-sex classroom and declaring it is pursuing diverse educational opportunities will not pass legal challenge. If Districts are considering single-sex classes, Districts must make an unbiased assessment based on evidence of the educational need of both sexes.

The new amendments provide a non-exhaustive list of factors that the U.S. Department of Education will use in an aggregate approach to determine whether single-sex classes or extracurricular activities are substantially equally. These may include:

- Improving student performance to meet the goals of No Child Left Behind.
- Meeting requirements for average yearly progress.
- Reducing discipline referrals.
- Recognizing learning style differentials.

Considering single-sex classes is not to be taken lightly. The final Regulations have language that when comparing single-sex classes and coeducational classes, factors should be considered alone and in the aggregate to determine if such classes are substantially equal. Substantial difference or differences in one factor or a pattern of differences in the aggregate amounts to sex discrimination under the regulations.

As a cautionary note, any schools considering going in this direction need to thoroughly investigate the need for single-sex classes. Such classes should only be implemented if school district policy has been developed in consultation with the school solicitor.

While the U.S. Supreme Court has not issued any opinions regarding single-sex classes or schools in K-12 education, a little over 20 years ago, the Third Circuit Court of Appeals in the case of *Vorchheimer v. School District of Philadelphia*, 532 F.2d 880 (3d Cir. 1976) issued a decision allowing the School District of Philadelphia to operate two comparable single-sex schools. In that particular case, a female student wanted to attend an all-male academic high school and was not allowed to do so. At that time, the School District offered a number of types of high schools including an all-male academic high school and an all-female academic high school. The Third Circuit upheld that these single-sex schools did not violate the Equal Educational Opportunities Act because the language of the law and its legislative history does not clearly indicate single-sex schools are prohibited. In addition, the Court held that in this particular fact pattern, single-sex schools did not violate the Fourteenth Amendment because educational opportunities available at both schools were exceptional and the District was able to show sufficient evidence that some students might better learn in single-sex environments.

Any school district contemplating any course of action in regard to this topic needs to thoroughly investigate the issue and secure legal guidance. If interested in securing more information, visit the U.S. Department of Education's website which contains an overview of the literature assessing single-sex schools as well as articles summarizing the new Title IX final Regulations regarding single-sex classes in schools.
http://www.ed.gov/rschstat/eval/other/single-sex/single-sex.pdf

Court Confirms That Permanent Substitutes Are Part of Teachers' Bargaining Unit

A decision of an Arbitrator finding that "permanent substitutes" employed by a School District are members of a professional employees' bargaining unit has been upheld by the Commonwealth Court. In the case of *Somerset Area School District v. Somerset Area Education Association*, the District attempted to hire permanent substitutes to a contract which described them as at-will employees, without the guarantee of daily work, but promising them a higher per diem rate than that paid to day-to-day substitutes.

The Commonwealth Court decided that these substitute teachers were "professional employees" within the meaning of the collective bargaining agreement. The Commonwealth Court followed past case law on long-term substitutes and extended that reasoning in finding that "permanent substitutes" that did not have a guarantee of daily work still have a "community of interest" with the other classroom teachers. The Court emphasized that it was the District's intent to have these substitutes work 175 days of the 184 day school year.

The Somerset Area School District attempted to argue in this case that these "permanent substitutes" did not meet the definition of a "professional employee" under Section 1101 of the School Code. The Arbitrator had found that the permanent substitutes had the same certification requirements, working conditions and job duties as other classroom teachers, and therefore, met the definition of a "professional employee." The Arbitrator noted that the only real difference between the regular teachers and these substitutes was the fact that regular teachers worked 184 days, as opposed to the substitutes' approximate 175-day work year.

As School Districts across the State struggle with the ability to find an adequate number of substitute teachers, this decision provides guidance to School Districts that Districts cannot use substitutes on a regular basis and expect that they will not be included in the teachers' bargaining unit. Although day-to-day substitutes would not typically be included in the unit, when those day-to-day substitutes are working a substantial portion of the school year, the District is at risk for having those employees included in the bargaining unit under the reasoning of this *Somerset Area* case.

This case followed the previous reasoning of the *Millcreek* case, which found that long-term substitutes are considered members of a teachers' bargaining unit. Consequently, Districts should be careful in defining within their collective bargaining agreements the number of days that a substitute works that would qualify the individual to be included within the bargaining unit.

Private School Not Entitled to Greater Bus Service Than Public School Under School Code

In the recent Commonwealth Court decision in *Quasti v. North Penn School District*, the Commonwealth Court rejected an injunction request by parents of students wanting bus service to a private school, even though the students reside within 1 ½ miles of the School. Under the School Code, a District is not reimbursed for the transportation costs of a student who resides within 1 ½ miles of his/her school provided that the student has access to a District proposed walking route certified by the Pennsylvania Department of Transportation as non-hazardous.

In this particular case, the District had provided bus service even though it was not being reimbursed for a route within the 1-½ mile radius as provided by the Code. PennDOT had certified the walking route as non-hazardous, and the District discontinued bus service, leading to the injunction request. The Court found that when School Code provisions apply equally to public and private school students, the Commonwealth Court found that public school districts cannot be responsible for greater bus service to private school students than it provides to its public school students.

The parents in this case also pointed to the fact that a portion of the walking route would have included a short gravel walking path, that the parents protested as hazardous. The Court found that the gravel path was not part of the walking route, and dismissed all claims of the private school parents, finding that the School District had acted in accordance with its requirements under the School Code in no longer providing bus service to these private school students.

Teacher Who Complains of Non-Compliance With IDEA Has Retaliatory Claim

A School Psychologist who was terminated after complaining about the School's alleged non-compliance with the Individuals with Disabilities Education Act (IDEA) was found to have a cause of action for retaliation under the Federal Rehabilitation Act.

In this case of *Houlihan v. Sussex Technical School District*, Ms. Houlihan, School Psychologist, complained to various school personnel concerning incidents of non-compliance with the IDEA for special education students. Ms. Houlihan claimed that the Principal of the School re-wrote her job description to prevent her from speaking out and addressing incidents of non-compliance with her colleagues. She also alleged that after she contacted a School Board member, the Principal subjected her to written reprimands, negative performance evaluations, and ultimately termination of her contract. Ms. Houlihan challenged her termination of employment and sued for retaliation, also alleging an abridgment of her First Amendment right to free speech. The Federal District Court in Delaware in this case found that Ms. Houlihan had stated a valid cause of action under the Rehabilitation Act for retaliation.

The Court found that Ms. Houlihan's allegation that she was advocating on behalf of disabled students and their parents in an effort to correct instances of non-compliance with the IDEA has long been recognized by the courts as a protected activity for purposes of establishing a retaliation claim. The Court emphasized that the Principal and School Board member had been apprised of the alleged non-compliance with the IDEA, and that the allegations of reprimands and negative evaluations came shortly after Ms. Houlihan had contacted the School Board member. The Court concentrated on the "timing" of the termination of the contract following the complaints to the School Board member.

Although the Court stated that Ms. Houlihan could state a cause of action for retaliation, the Court found that her speech was not protected by the First Amendment, since her statements were not made as a private citizen, but were made as a public employee in connection with her job duties.

Nevertheless, the fact that this case was permitted to proceed by the Federal District Court as a retaliation case demonstrates that School Districts must be careful when employees are acting as "Whistleblowers" and alleging non-compliance with Federal Laws such as the IDEA. When such complaints are made by School employees, the District should be careful to avoid any negative adverse employment actions in order to avoid the possibility of a retaliation claim being brought through litigation.

Recent Special Education Court Decisions

(Continued from page 7).

generalized or speculative opinions regarding the amount of compensatory education needed to remedy the period of the alleged deprivation.

Other Circuits

Louisiana Dept. of Educ. V. Sch. Bd. Of Ouachita Parish, No. 0530767 (5th Cir. August 22, 2006).

The U.S. Court of Appeals for the Fifth Circuit has ruled that a Louisiana high school student was not denied his rights under the federal Americans with Disabilities Act (ADA) or denied a free appropriate public education (FAPE) under the federal Individuals with Disabilities Education Act (IDEA) by a route to his family and consumer science classroom that was substandard and an auditorium stage that was not accessible by wheelchair.

Recent Special Education Court Decisions of Note

Pennsylvania

B.C. v. Penn Manor School District, 2006 WL 2346303 (Pa.Cmwlth).

> In August 2006, Commonwealth Court on a case of first impression relied upon a 2005 Circuit Court decision out of the District of Columbia determining that in situations involving an award of compensatory education in Pennsylvania a "qualitative" versus a "quantitative" of compensatory education should be applied. In so doing, Commonwealth Court deviated from the Third Circuit Court of Appeals decision in *M.C. v. Centrail Region School District*, 81 F.3d 389 (3d Cir. 1996), wherein the Third Circuit held that a disabled child is entitled to compensatory education for a period equal to the period of deprivation.
>
> In so ruling, Commonwealth Court stated that they found the Ninth Circuit Court of Appeals and the District of Columbia decisions more persuasive and workable than that of the Third Circuit.
>
> Most recently, a Pennsylvania Appeals Panel took exception with the Commonwealth Court decision in *Penn Manor*, finding that applying the "qualitative" standard was too speculative.
>
> In the Appeals Panel case (SEO No. 1763), the Panel stated as follows:
>
> > The standard announced in *B.C.* requires a hearing officer or Appeals Panel to determine the level of achievement of a student with a disability *if* that student had received appropriate instruction. However, *B.C.* offers no guidance as to how a hearing officer or the Panel should go about making this determination. Rather, the court relied on the "special expertise of hearing officers and the Panel in such matters."
> >
> > In the present case, the level of achievement that S would have attained had he received appropriate instruction is not addressed in testimony, exhibits or arguments. This Panel knows of no validated method to predict, with a reasonable degree of accuracy, a student's progress under a specific intervention other than prior progress under that specific intervention. In essence, the *B.C.* court has given hearing officers and the Panel a hypothetical question with multiple unknown variables. For example, appropriate instruction is not a unitary construct; there are often multiple types of instruction that might be appropriate, and these forms of instruction may be provided in varying combinations and degrees of intensity. Also, as a result of instruction, as well as development in general, students change in ways that cannot be known *a priori*; a student might form a learning set as a result of instruction and learn more rapidly, or might become bored or disinterested in the content of instruction and learn less rapidly. How changes in students affect their response to instruction cannot be known *a priori* but can be learned during the instructional process. Here, the Panel simply does not know what is needed to move S to a level that cannot be determined.

Pennsylvania schools need to be mindful of the dichotomy that currently exists between the Commonwealth Court and the Third Circuit Court of Appeals opinions as it relates to an award of compensatory education in special education cases.

Districts facing due process on compensatory education issues need to be prepared to defend against *(Continued page 6).*

Andrews and Beard Education Law Focus

As solicitors, labor counsel and special counsel, Andrews and Beard represents more than 50 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
* Leaders in Timed Mediation contract negotiations

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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