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Court Finds Strict Liability for Teacher Having Affair With Student

A Federal Court in Pennsylvania has found strict liability against a School District where a former student sued the School District over a ten (10) month long sexual relationship with her band teacher. In this case, the argument was asserted that the affair was "consensual."

However, the Federal Court in the recent case of *Chancellor v. Potts Grove School District* found that a student does not have the "legal capacity" to welcome a teacher's sexual advances despite being seventeen (17) years of age at the time of the affair. In this case, the female student testified at her deposition that the affair with the band teacher was entirely consensual. However, the Court noted that the law does not recognize consent as a defense in a sexual harassment case of this nature.

The Court specifically stated that it held "a high school student who is assigned to a teacher's class does not have the capacity to welcome that teacher's physical sexual conduct. Under these circumstances, the teacher's conduct is deemed unwelcomed."

Further, the court noted that unwelcomed sexual conduct constitutes a sexually hostile educational environment, and is a form of sexual harassment that constitutes discrimination on the basis of sex, which would violate Title IX.

The Court concluded by noting that "a teacher who has sex with a high school student who is assigned to his class discriminates against the student on the basis of sex in violation of Title IX." This case demonstrates that a School District will never have the defense that the affair between a teacher and a student was consensual even if the student may be an older student in the High School.

Andrews & Beard recommends that School Districts should be proactive when hearing of even rumors of affairs between teachers and students. Districts must take steps to assure that such situations are not occurring within the School District, or face liability in the manner that was discussed in this case.

IN THIS ISSUE

Student Expulsions Upheld for Computer Hacking

Two students were expelled for violating the Central York School District Computer Use Policy. The two students that hacked into the school's computer system, found confidential passwords and user names, accessed teacher accounts and logged into the HVAC System at the High School. The students involved were expelled from the school, but challenged the expulsion on the fact that the Computer Use Policy of the School District did not list expulsion as a specific discipline for violations of the policy, thus, the students argued that they should be suspended rather than expelled. In this case the Court of Common Pleas of York County found that the Policy of the District allowed for variations of discipline for individual cases and the District acted within its power to expel the students.

The students also challenged the School District on due process grounds, but the court found that the students had been given notice of the charges and opportunity to be heard at the formal hearing. The students also challenged the expulsions on the allegations that there was a co-mingling of duties by the Superintendent in acting both as a prosecutor and an adjudicator. However, again, the Court found in favor of the District on this issue and found the Superintendent prosecuted the expulsions but did not participate in the voting process or as an adverse witness at the disciplinary hearing.

This case demonstrates the need for school districts to have comprehensive Computer Use Policies. It is recommended by Andrews & Beard that the Computer Use Policies be specific in noting the ability to expel students for violations of the policies. In addition, this case also illustrates that administrators need to be careful in not mixing the prosecutorial and adjudicatory functions in a discipline case. It is recommended that the Superintendent and the members of the Administration stay with the prosecutorial function of a discipline case and not get involved with the Board in the adjudication process.

Determination of "Gifted" Child is Decision of Districts

The Commonwealth Court of Pennsylvania has ruled that it was within the province of a local school district to refuse to identify a 6-year old as "Gifted" despite requests by the parents to have the child so labeled.

In the case of *E.N. v. M. School District*, E.N.'s parents noted to school officials that the child had received an evaluation from the Johns Hopkins Center for Talented Youth with an IQ at or approaching 130. However, the Mathacton School District concluded that the First Grader had trouble handling academic pressure and was having difficulty interacting with classmates. Therefore, the School District refused to place the child in a "gifted" status at the School District.

In enrolling for School, the Commonwealth Court noted that "while E.N. has displayed some characteristics of giftedness, E.N. has also displayed some characteristics that suggest against a finding of giftedness."

Although the Mathacton School District's evaluation of E.N. resulted in IQ scores at or near the 130 level, the Commonwealth Court found that the behavior-emotional indicators were a sufficient basis for the School District to refuse the gifted status.

After E.N.'s parents appealed the decision of the School District, a hearing officer conducted four days of hearings with the parents calling several witnesses in support of their claim. The Hearing Officer initially ruled in favor of the parents, but the State's Special Education Due Process Appeals Panel reversed the Hearing Officer and ruled in favor of the School District.

This decision provides ample support to any School District that feels that behavior and emotional factors should preclude a student from entering the gifted program, despite an IQ level of 130 or above.

Court Rules Discipline for MySpace Profile Must Have Connection to School

The recent Pennsylvania Federal District Court decision has ruled that school officials violated a high school student's free speech rights when they disciplined him for his Myspace profile on a school principal that was created off campus. In the case of *Layshock v. Hermitage School District*, decided in July 2007, the court acknowledged that a School District may discipline a student for improper Myspace usage, but there must be a connection to the school setting.

The student in this case created a negative Myspace regarding the school's principal. Although some students did access it on school computers, the court found that there was an insufficient "nexus" to the school setting to overcome Free Speech Rights since it was an off campus expression. This is the first Federal court case on this topic since the United States Supreme Court decision in *Morse v. Frederick*. This Court distinguished the US Supreme Court decision *in Morse v. Frederick* stating that case involved school-related speech rather than off campus speech.

The Court gave guidance to school districts on what evidence would be necessary to show sufficient educational disruption with an off campus Myspace profile. The Court noted that this case had an absence of actual disruption because no classes were cancelled, there was no wide spread disorder and no involvement of disciplinary action in the school. Thus, if the School District could show sufficient educational disruption through the interruption of the delivery of education by students constantly discussing the Myspace profile or regularly accessing Myspace profile in a school setting, discipline could be appropriate.

This Court also concentrated on the fact that the profile was not obscene and although the Court considered it "juvenile and lacking serious value" it did not appeal to a prurient interest or portray sexual conduct.

Andrews & Beard recommends that in the event of an off campus Myspace profile being disseminated in a school setting, the School District should do a thorough and prompt investigation to show the necessary educational disruption to proceed with discipline, if warranted. The Pennsylvania Supreme Court has previously ruled in the case of *J.S. v. Bethel Area School District* that school officials have the authority to discipline a student for an off campus website containing derogatory and threatening comments. The court, in this particular decision, found that the student expression was not as strong as the Myspace profile in the *Bethel* case.

Uninformed School Board Votes Still Valid

The Commonwealth Court has held that it is the responsibility of a School Board to be informed about the details of a vote that is taken by the Board. In the case of *Wrazien v. Easton Area School District,* the Commonwealth Court held that even though various Board Members testified that they did not understand that they were voting to pay a retired employee 100% of his sick days, the vote was still a valid vote of the School Board.

The Commonwealth Court held that Section 508 of the School Code does not require Board Members to "educate themselves on the specific terms of a contract under their review in order for their votes to be valid." The Court went on to explain that Section 508 requires a "vote, not an intelligent and knowledgeable vote." *(Article continued on page 5).*

U.S. Supreme Court Backs School Districts on Regulating the Promotion of Drug Use

In its first decision regarding student free speech rights in decades, the United States Supreme Court has held in the favor of a school district in *Morse v. Frederick*. At a school-sanctioned and school-supervised event, a student hung a 14 foot banner across from the school stating "BONG HITS 4 JESUS." The student was suspended for ten (10) days according to school board policy, but objected on the basis of free speech. The School Board policy in this case subjected pupils who participate in approved social events and class trips to the same student conduct rules that are applied during the regular school program.

The United States Supreme Court upheld the suspension and denied the challenge on a free speech basis. The Court reaffirmed its holding in *Tinker v. Des Moines* which held that students have free speech rights, although not to the same extent as adults. The Supreme Court emphasized that deterring drug use by school children is an "important-indeed perhaps compelling interest," citing the Federal Safe and Drug-Free Schools and Communities Act. Consequently, the Court concluded that the government interest in stopping student drug abuse, as reflected in the policies of Congress in a myriad of School Boards, allows schools to restrict student expression that they reasonably regard as promoting illegal drug use.

In addition, the Court drew distinction that this student expression did not involve political expression, as many of the older free speech cases.

Andrews & Beard believes that this case supports the right of School Boards to promulgate and implement strong policies deterring the promotion of drug use, and the ability to discipline for any violation of such a policy. This *Morse* decision emphasizes the important role that School Districts play in discouraging drug use throughout the school setting.

Retiree Health Benefits Can Be Stopped at Medicare Age

The issue of stopping retiree health benefits at Medicare age or age 65 has been upheld by the Third Circuit Court of Appeals in *AARP v. EEOC*. The Third Circuit had previously held such prohibition to be illegal, but the EEOC promulgated regulation exempting from age discrimination the practice of altering, reducing, or eliminating employer-sponsor retiree health benefits when retirees become eligible for Medicare or a state-sponsored retiree health benefits program.

Under the prior Third Circuit decision, many School Districts had modified their collective bargaining agreements when providing for retiree health insurance benefits to eliminate the reference to the benefits stopping at time of eligibility for Medicare. Many Districts placed into their collective bargaining agreements a certain number of years for the health insurance benefits to continue rather than linking any stopping of benefits to a particular age or Medicare.

Under this decision, School Districts can once again provide a collective bargaining agreement or policy that retiree health insurance benefits can cease at the time that the employee is eligible for Medicare or any other state-sponsored retiree health benefits program. School Districts can now proceed with such provisions without the fear of age discrimination law suits being brought by retirees or future retirees.

Employee Can Choose A New Representative for Investigatory Interview

The Pennsylvania Supreme Court has held that a public employee has the right to be accompanied by a Union Representative of his or her choosing during an investigatory interview in the recent case of *Office Administration v. PLRB.*

In this case, the employee, who was the correctional officer, was instructed to report to his supervisor for counseling due to allegations that he had missed his role call 15 times. The employee asked to be represented by a different Union Steward than was provided. The Supervisor in that case refused the request of the employee to select his own Union Steward for the counseling session.

The Court first found that the interview was investigatory in nature and it triggered the employee's Weingarten rights and that the employee was entitled to an available representative of his choosing, absent any extenuating circumstances.

The Supreme Court of Pennsylvania found that the employee has the right generally to a choice of Union Representative on the basis that rights under the Pennsylvania Employee Relations Act are not vested in the Union, but in the individual public employee.

The Supreme Court classified that the employee's choice of a Union Representative is permissible as long as the Union Representative is reasonably available and there are no extenuating circumstances.

Thus, under this decision, Andrews & Beard recommends that when conducting the investigatory interview of the union employee, the employer attempt to permit the employee to have a Union Representative of his or her choice. However, if for example, the Union Representative works at a different time or is absent on the date in question, we do not believe that this decision permits a postponement of the investigatory interview. Our reading of this decision provides for the School District to allow the employee the choice of a Union Representative as long as the Representative can be available for the interview within a short period of time when the interview is scheduled.

In another decision just issued, the Pennsylvania Labor Relations Board has stated in the *Erie City School District* case that the Union does not have a right to have an attorney attend an investigatory interview. The PLRB followed the Supreme Court rationale in holding that the right to designate a representative at an investigatory interview rests with the employee, not the Union. Thus, the School District was within its right to eject any individuals from the interview other than the one designated by the Union member.

Uninformed School Board Vote

Continued from page 3

The Court explained further that the fact that some Board Members did not understand what they were voting on, which was emphasized by the District in this case, is not material. The Court concluded that the School Code does not nullify votes cast by Board Members who have chosen not to inquire into the details of what they were voting on.

Thus, this Court emphasizes that there is a necessity of School Board members to make sure they understand all details and consequences of a vote prior to the actual publicly cast vote being taken.

Federal Court Issues Decision On Computer Stored Information

In the first Federal Court case in Pennsylvania under the amended Federal rules on electronically stored information requirements, the Federal Court in the case of *Cenbeo Corp. v. Slater* permitted a Plaintiff to obtain a Defendant's computerized information by allowing the Plaintiff's data recovery computer expert to produce a digital image of all the Defendants' computers and permit the expert to recover all documents with digital images of the computers, as well as the Defendants being required to give the Plaintiff all non-privileged documents contained in their computers.

This case illustrates that Courts will require School Districts to not only maintain electronically stored information that may be the subject of litigation, but produce such information in the event of litigation.

In light of this case School Districts must be careful to preserve electronically stored information that might be the subject of litigation. School Districts should have a policy to have a procedure in effect to place a "litigation hold" on electronically stored information that could be the subject of reasonably anticipated litigation. The School District should engage its IT personnel and make sure that a policy provides for rules on issues such as automated deletions of emails and the archiving of back-up tapes.

Andrews & Beard recommends that School Districts should train all employees on the proper use of computers and email, and assure that employees have been instructed that anything stated in an email could be the subject of litigation and be subject to cross examination in a court of law.

Plaintiffs suing the School Districts are increasingly relying on discovery of electronically stored information as a basis for a lawsuit, particularly in cases such as sexual harassment. School Districts cannot ignore the fact that the new Federal rules as well as court decisions will mandate the release of such information, and the School Districts must be prepared to deal with these issues through policies and training.

Payment of Private School Tuition Under IDEA Denied

In the Third Circuit case of *Lauren W. v. Deflaminis,* the Third Circuit held that the refusal to fund the private school tuition for the spot for the private school in which the parents had unilaterally placed their daughter unless the parents agreed to waive certain IDEA rights did not support the parents' claim of unlawful retaliation under the IDEA.

Further, the Third Circuit held that the District was not required to provide related services at a public school under Section 504 for a student who was provided Free and Appropriate Public Education at a private school, and the Court further held the parents were not entitled to reimbursement for costs of an educational evaluation.

In addition, the Third Circuit held that the parents were not unjustly enriched by the District's payment for private school tuition for a period of time that included a semester after the date that the Hearing Officer had set for the student's return to public school.

Student Expulsion Upheld for Consumption of Alcohol

When several students consumed alcohol on school premises during school hours, the School District's expulsion of the students was upheld by the Commonwealth Court in the case of *Haas v. West Shore School District*.

The challenge in this case came about when one student had been interviewed and provided a written statement wherein he stated another student told him he had alcohol in an iced tea bottle, and the student, Haas, admitted taking a drink from the bottle because he did not believe it was true.

Haas challenged the statement given to the School District because the School District had a policy that prohibited the District from requiring students to submit to surveys or evaluations by outside entities which would disclose illegal, anti-social, self incriminating or demeaning behavior. The Commonwealth Court rejected that argument and found the District's request for a voluntary written statement from Haas in connection with the disciplinary investigation was not the kind of survey addressed by the Board Policy. The Court found that the admission of the student to drinking the alcohol, as well as a positive breathalyzer test provides substantial evidence for the School District to proceed with the expulsion from school.

This case illustrates the need for quick and thorough investigations in these types of situations. The fact that the School District acted promptly in obtaining a voluntary statement from the student gave the School District sufficient evidence on which to base the expulsion. If the District had waited a substantial period of time, it might not have been able to obtain the voluntary written statement of the student as was given in this case.

Teacher Awarded Workers' Compensation Benefits for Psychological Effects for Breaking Up Students' Fight

A teacher who suffered psychologically after being bitten on her arm while breaking up a fight between two Fourth Graders has been awarded workers' compensation benefits by the Commonwealth Court of Pennsylvania. The teacher, with the Philadelphia School District, claimed a psychological injury after experiencing anxiety and depression following the incident of breaking up a fight between two students.

The teacher had initially been concerned about the possibility of having contracted a disease as a result of the bite, but later stated that she had been experiencing feelings of professional inadequacy. The teacher then began seeing a psychologist and was diagnosed with depression and found to be exhibiting post-traumatic stress syndrome. Although the Workmens' Compensation Appeal Board had found that benefits were not appropriate because they did not believe that teacher's psychological injury was of a disabling nature, the Commonwealth Court found to the contrary.

This decision could serve as a basis to promote the filing of workers' compensation claims by teachers involved in incidents or scuffles between students.

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

The Pennsylvania School Study Council, Inc.

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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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