

Pine-Richland Awaits Judge's Decision in Transgender Case

On September 12, 2016, the Pine-Richland Board of School Directors, after much debate and discussion over a several month period, passed via vote of 5 to 4, a policy requiring students to use the restroom that matched their biological sex, or any unisex facilities. By way of background, the Pine-Richland High School had approximately ten (10) unisex restrooms. Prior to the passage of the Resolution in question that caused Plaintiffs to file

a Federal Court action against the school district, the School Board had taken no action on directing use of the school district's restrooms inconsistent with the students' biological sex. Prior to the Board taking action on what was referred to as passage of Resolution No. 2, community members voiced concerns at School Board meetings that permitting students to utilize restrooms corresponding with their stated gender identity, rather than biological sex, resulted in an unacceptable invasion of privacy.

Prior to the Board's action on September 12, 2016, the Superintendent of Schools on March 11, 2016, emailed parents and guardians of students noting that there were transgender students in the school district and that the district had not previously communicated about the topic based on the strong desire to maintain the confidentiality of individual students and that the U.S. Department of Education, Office of Civil Rights had taken a consistent stance that gender identity and expression are included in the term "sex" or "gender" under Title IX that prohibits sex discrimination in schools.

In his email, the Superintendent described the District's long-standing inclusive practice with respect to restrooms as follows:

In our high school, transgender students have been able to use a private bathroom, such as the nurse's office, a single room unisex bathroom, or a bathroom of their

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gender identity. This has occurred for several years. To date, we are not aware of any inappropriate actions on the part of any student. The option also exists for any student to use a single stall bathroom.

The day after the passage of the Board's Resolution, the District implemented the Resolution by barring transgender students from using the restrooms and other sex-designated spaces consistent with their gender identity by mandating that transgender students utilize the restrooms that are not consistent with their gender identity or use single stall unisex restrooms.

The following day, students were notified that they would be disciplined should they use restrooms that are consistent with their gender identity. In response to same, Plaintiffs, through their private counsel, then filed a Complaint in Federal Court seeking injunctive relief, asking the Court to permit them to use the restrooms of the gender with which they identify.

The Court subsequently directed the Plaintiffs to file Proposed Findings of Fact and Conclusions of Law. In response to same, the School District filed a Motion to Dismiss along with a Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunctive Relief.

On December 1, 2016, both parties had occasion to argue their respective positions before the Honorable Judge Hornak. Both parties are now awaiting a decision by the Judge on the Plaintiffs' request for Injunctive Relief.

This case will certainly have significant ramifications across the Commonwealth for Pennsylvania public schools.

Previously, U.S. Supreme Court announced on October 28, 2016, it shall hear the case on and ultimately determine, transgender student bathroom usage in *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, a case arising out of the 4th Circuit Court of Appeals in Virginia.

Pennsylvania Medical Marijuana Effect on Pennsylvania Public Schools

On April 17, 2016, Governor Tom Wolf signed Pennsylvania's Medical Marijuana Legislation. On May 17, 2016, the Law was put into effect.

On December 21, 2016, the Pennsylvania Health Department Secretary Karen Murphy announced applications for Grower/Processor and Dispensary Permits will become available on January 17, 2017, and those applications are due on March 20, 2017. The Department plans to announce a first round of approvals for up to twelve (12) Grower/Processor Permits and up to twenty-seven (27) Dispensary Permits in late June 2017. A second round of Permits will be issued at a later date.

In order for a patient to receive a prescription for medical marijuana, the patient must have one of the conditions outlined in the Law. The patient will need to be under the care of a Physician who will then provide them a Certification that the patient has a serious medical condition. The patient must then apply to the Pennsylvania Department of Health for an ID card. Once the patient receives the card, the employee can purchase medical marijuana at an authorized dispensary.

Under the Law, the Department of Education has been directed to provide Regulations regarding possession and use of medical marijuana by Employees of Pre-Schools and Primary and Secondary Schools on school grounds and by students on school grounds. The Act states that by November 17, 2017, various Commonwealth Agencies must develop Policies or Regulations addressing application of the new Law. Thus, the Department of Education Regulations should be provided to School Districts by November 17, 2017.

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U.S. District Court in New Hampshire finds that student's inability to handle service dog is insufficient to support parents' request for the District to provide adult assistance during the school day to handle "the dog"

A year ago in a Florida case (*Alboniga*, 65 IDELR 7) the Court required the District to provide School District employee assistance to the student to deal with the service dog's care. A similar ruling was made in a New York case (*Gates-Chili Central School District*, DJ No. 204-53-128 (4/13/2015) 65 IDELR 152) wherein the Court outlined that the School District needed to provide assistance to the family and student to help care and control the dog. In the New Hampshire case (*Riley et al v. School Administrative Unit #23, et al.*), the parents wanted the District to assign a staff member to control and supervise the dog throughout the school day. According to the record, the eight year old boy is unable to hold the service dog's leash or give verbal commands. In this particular case in attempting to seek injunctive relief, the parents needed to show that there was a substantial likelihood they would succeed on the merits of their Section 504 and Title II Claims.

In this case the Magistrate Judge found that the parents could not meet the standard that the requested accommodations were reasonable (i.e., assignment of the District employee to issue verbal commands and hold the dog's leash). According to the Magistrate Judge, Title II of the Americans with Disabilities Act requiring a service animal to be under the control of its handler does not define the term. The Magistrate Judge rejected the parents' claims, the student was going to be the dog's handler. The Judge opined that the student cannot provide voice commands because he is primarily non-verbal.

When Districts are faced with these types of requests they are encouraged to consult with their Solicitor or Special Counsel before responding to the

parents' request for assistance. Districts should also ensure that they have an up-to-date policy addressing these types of requests in the school setting. This case is a **must read** for any school district facing a request to provide a "handler" to assist the Student with a service animal.

Take away: Any case involving requests for accommodations surrounding a service dog is going to be factually intensive. In this particular case, the District's obligation to provide assistance depended on whether the student qualifies as the service animal's "handler" under Title II of the ADA.

U.S. Supreme Court Hears Argument on IDEA Case

On Wednesday January 11, 2017, the U.S. Supreme Court heard arguments on the Colorado case of *Andrew F. v. Douglas County School District*. The Justices will determine the amount of progress that is necessary for an identified student to receive in order to receive FAPE. At issue is the 10th Circuit Court of Appeals ruling of "minimally adequate progress" versus the Parent's request to see their child make "significant progress." In the Third Circuit (*Rowley*) requires the Student to derive "meaningful benefit" from their educational program.

Lower Merion School District Appeals Rescission of Tax Increase

In 2006, the General Assembly passed the Taxpayer Relief Act, also known as Act 1, in which the Pennsylvania Department of Education (PDE) capped the amounts that school districts could raise from additional local property taxes in a given year. School districts needing to exceed the established tax cap are to submit the proposed tax to the voters in a referendum; however, school districts may obtain approval from PDE for the tax increase by applying for exceptions in the instances of excessive special education costs, grandfathered debt from school construction, and retirement contributions.

The Lower Merion School District was granted approval from PDE to exceed the current fiscal year tax cap of 2.4% and impose a 4.4% tax on residents for the fiscal year 2016-2017 on the District's representations that increased taxes were needed to fund special education and employee pension costs. On February 1, 2016, taxpayers of the District filed a complaint in the Court of Common Pleas of Montgomery County seeking to prevent that tax increase for the upcoming fiscal year; an injunction was later filed requesting the Court to rescind the 4.4% tax increase and/or refund any taxes paid under it. In support of their claim, the taxpayers argued that the District misled them into believing a large tax increase was necessary to avoid multimillion-dollar deficits whereas year-end audits showed multimillion-dollar surpluses.

Following testimony from two witnesses, including the District's business manager, and evidence of the District's proposed budgets for revenues for fiscal years 2008-2009 through 2016-2017, Montgomery County Judge Joseph A. Smyth agreed with the taxpayers that an injunction was appropriate. In his decision, Judge Smyth criticized the District's budgeting and taxing practices and found that the District had engaged in "a persistent, unbroken pattern for many years" of understating revenues and overstating expenses so it could falsely

raise taxes when, in actuality, the District had huge surpluses that were hidden by naming accounts and transferring surpluses to them to avoid the established tax cap. The average overestimation of expenses was 5.5% per year whereas the average underestimation of revenues was 1.1% per year. Judge Smyth ruled that the District could increase taxes for 2016-2017, but by no more than the current tax cap of 2.4%.

The District appealed the injunction to the Commonwealth Court arguing that the District raised taxes following PDE's review and approval, and the Pennsylvania General Assembly gave PDE **alone** the right and power to review the tax increase. The taxpayers currently seek to strike this ongoing appeal in the Commonwealth Court. With all pertinent briefs filed relative to this issue and oral arguments completed on December 15, 2016, the Commonwealth Court will likely issue its decision in early 2017. The Commonwealth Court's decision has statewide impact as it could establish that it is the judiciary, and not school officials, that determines the appropriate amount of money needed to support public education.

Pennsylvania Medical Marijuana Effect *Continued from page 2*

Since the Department of Health will announce the Grower/Processing Permits and Dispensary Permits in late June 2017, patients will not have access to medical marijuana until after that date. This will provide the Department of Education ample time to provide these Regulations prior to School Districts starting the 2017-2018 school year.

Commonwealth Court Establishes New Procedural Requirements in Teacher Dismissal Case

On June 2, 2016, the Commonwealth Court of Pennsylvania, in the case of *The School District of Philadelphia v. Ellis Jones*, No. 2150 C.D. 2013, *Ellis Jones v. The School District of Philadelphia*, No. 2230 C.D. 2013, reversed the Acting Secretary's order discharging Ellis Jones for immorality in the classroom. Jones was accused of using foul language and engaging in topics of discussion related to sex.

The Court stated that they agreed with the District that Jones' acts were immoral and would be grounds for termination. However, the Court concluded the District committed multiple procedural violations of Section 1127 of the School Code, which violated Jones' right to due process. Commonwealth Court held the District's action violated the School Code provisions requiring a statement of charges be attested by the Board Secretary and that a Board hearing be held within 15 calendar days of the request for hearing.

The Court found the following steps must be taken, in this order, in order for a district to comply with Section 1127. First, the school board, by resolution, must state it has sufficient evidence for discipline. The board president and secretary must provide written notice of charges to the teacher along with the right to a hearing. Second, the written statement of charges should be signed by the board president and secretary, sent by registered mail to the employee, and put the teacher on notice of the time, date, and location of the appeal hearing. Lastly, the hearing must be between 10 to 15 days after the initial written notice to the employee.

Prior to Jones, the Board President and Board Secretary would sign the Statement of Charges letter to the employee that would be sent out registered mail. Now, prior to issuing a Statement of Charges, the School Board in Executive Session must be provided with "sufficient evidence" to support its belief the professional employee should have dismissal charges brought against him/her. After the Board hears such

evidence, the Board of School Directors must pass a formal public resolution stating there is "sufficient evidence" to issue the Statement of Charges against the employee. This requirement is a deviation from what school districts did in the past when issuing Statement of Charges against professional employees.

The formal resolution of the School Board could be as follows:

Moved by _____, seconded by _____ to authorize the issuance of a Statement of Charges against a professional employee (Employee No. _____) extending an opportunity for hearing under Section 1127 of the Public School Code of 1949, as amended, and further authorize the Board President and Board Secretary to sign same and serve notice upon the Employee of such an entitlement to a hearing. In so doing, the Board believes there is sufficient evidence to support its belief a Statement of Charges should be issued to afford notice to the employee and an opportunity for a hearing.

In addition, when sending out the Statement of Charges letter, the Board Secretary should include other language confirming the Board of School Directors voted on such a motion/resolution. Such language could be as follows:

I hereby attest that this Statement of Charges has been approved by resolution of the Board of School Directors at a public meeting on [date], that it was signed by the President of the Board of School Directors in my presence, and that I am the Secretary of the Board of School Directors duly authorized to make this attestation.

Practice Note: Districts should consult with their Solicitor or Special Counsel in drafting the Statement of Charges or drafting the resolution/motion regarding the sufficiency of evidence to approve issuing a Statement of Charges against a professional employee.

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Penn State Law Day

Please reserve the date of
October 11, 2017
for the next
Penn State Law Day.

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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 ljw11@psu.edu.

Subsequent Issues

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Education Law Report is published by Beard Legal Group, P.C.

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