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United States Supreme Court Declines to Hear *Layshock* and *Blue Mountain* Cases

The Third Circuit decided both the *Layshock* and *Blue Mountain* cases in June of 2011. Both cases tested the bounds of free speech and stem from incidents in two separate Pennsylvania school districts where students were disciplined for off-campus speech about school administrators. Ultimately, in both cases, the Third Circuit found for the students, stating that without substantial disruption within the schools, off-campus speech cannot be punished by a school district.

Both cases were appealed by the School Districts to the United States Supreme Court. In January of 2012, the United States Supreme Court decided to deny review of these cases and let stand the decision of the Third Circuit.

At this point, because the United States Supreme Court has refused to hear these appeals, they will remain law. While student speech issues are a common occurrence in Federal litigation, and the likelihood of the United States Supreme Court hearing an appeal on a different student free speech case is very high, for now, they have left the Third Circuit rulings with no decision, effectively upholding that without a substantial disruption within the schools, off-campus speech cannot be punished by a school district.

Schools may still punish expressive conduct that occurs outside of school, as if it occurred inside the "schoolhouse gate" under certain very limited circumstances, including cases where substantial disruption occurs; however, if the speech occurs off campus, is not during a school-sponsored event, and it causes no substantial disruption, the School District may not discipline the student without violating that student's Free Speech rights.

Where inappropriate off-campus speech occurs, any substantial disruption that speech causes to the District must be documented in order for the District to appropriately discipline the student. For example, times when the speech interrupts class, causes teachers and administrators to detract from their ordinary duties, facilities are unable to be used, or school business is deterred in any way, should be documented accordingly.

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Commonwealth Court Considers Disclosure of Public Officials' Emails under the Right-to-Know Law

On December 7, 2011, the Commonwealth Court of Pennsylvania decided the case of *Mollick v. Township of Worcester*.

In this case, a Requestor, James Mollick, appealed an Order of the Court of Common Pleas denying his request for emails transmitted by and between township supervisors on their personal computers and/or via their personal email accounts. The Requestor argued that the trial court made several unsupported factual findings and committed errors of law by holding that the deliberation of township business by and among a quorum of the township supervisors via the supervisors' personal computers and email accounts is not an activity of the agency.

The trial court considered the request seeking information for emails transmitted by and between the township supervisors on their personal computers and/or via their personal email accounts to be applicable to the Commonwealth Court's decision in *Silberstein*, a 2011 case in which the Commonwealth Court held that certain emails and documents identified on an individual township commissioner's personal computer were not public records.

The Requestor here specifically contended to the Commonwealth Court that the requested emails were public records regardless of whether they were contained on a personal computer or a personal email account because the emails were amongst multiple supervisors and "deliberation" of township business by a quorum of supervisors is an activity "of" the township. The Court recognized that the Right-to-Know Law defines a record as "information regardless of physical form or characteristics, that documents transaction or activity of an agency and that is created, received or pertained pursuant to law or in connection with the transaction, business or activity of the agency."

Accordingly, the Commonwealth Court held that, regardless of whether the supervisors in this matter utilized personal computers or personal email accounts, if two or more of the township supervisors exchanged emails that documented transaction or activity of the township and that were created, received, or retained in connection with a transaction, business or activity of the township, the supervisors may have been acting as the township and those emails could be considered to be records of the township subject to the Right-To-Know Law. Therefore, the Commonwealth Court held that any emails that meet the definition of "record" under the Right-to-Know Law, even if they are stored in a supervisor's personal home computer or in a personal email account, would be a record of the township.

Further, the Commonwealth Court held that the Court's earlier decision in *Silberstein*, was not applicable to this matter, because in *Silberstein*, the Requestor had asked for emails between one township commissioner and his constituents and an outside legal counsel regarding certain applications for a development project in that particular township. Specifically, in that case, because the emails were between an individual township commissioner and his constituents and the township commissioner was an individual public official with no authority to act alone on behalf of the township, the emails were not subject to disclosure.

In the instant case, the Commonwealth Court stated that they could not reach the question of whether some of the emails exchanged were between a quorum of the supervisors which constitutes

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Layshock and *Blue Mountain* Cases

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School districts should contact their solicitor when such off-campus speech becomes known to administrators and before any disciplinary steps are taken and be sure to document in-school disruption as and when it occurs.

Pennsylvania Supreme Court Sets Limits on Cyber Charter School Funding

In late November, 2011, the Supreme Court of Pennsylvania issued a decision in *Slippery Rock Area School District v. Pennsylvania Cyber Charter School,* stating that public school districts do not have to pay for cyber education programs for four-year-old students if the public school district offers no such program of its own. Many school districts have asked the legislatures and courts to curb the power of cyber charter schools and this decision is a step in that direction.

Slippery Rock Area School District (the "District") challenged the Pennsylvania Department of Education ("PDE") over a $1,716.63 payment to Midland-based Pennsylvania Cyber Charter Schools for a four-year-old kindergarten student for the year 2006. In the decision, Justice Joan Orie Melvin wrote, "Cyber school may still set the entry age of its students and allow four-year-old children to enroll in its kindergarten program, but it does so at its own cost if the student's home district has set a different entrance age."

The Court recognized that the Charter School Law ("CSL") provides for funding of charter schools by requiring a school district to pay the charter school for each student residing in the district who attends that same charter school. In this case, the District had funds deducted from its state subsidy that were made payable to the Pennsylvania Cyber Charter School because of a four-year-old female student who had enrolled in the cyber school's kindergarten program. Within 30 days of the notification to the District that the funds had been deducted for this four-year-old female student, the District notified the PDE that the deduction was inaccurate, and objected to the withholding of the $1,716.63 for this student as contrary to law because the Public School Code only requires the District to educate every person, residing in the district, between the ages of 6 and 21 years.

While the District did admit that it operates a discretionary kindergarten program for five-year-old children, the four-year-old student still fell below the age threshold for the District, and because the student at issue did not meet the age requirements for admission into the District's kindergarten program, Slippery Rock argued that it was not obligated to assume the costs or obligation of this individual's enrollment into cyber school.

After a hearing on the matter in front of the PDE, the Secretary of Education granted the cyber school payment and dismissed the District's objection on the grounds that the Public School Code gives school districts the discretion to establish and maintain kindergarten programs for children between the ages of four (4) and six (6) years and this power of a school district does not prohibit a cyber charter school from implementing a similar program. The Secretary further found that the cyber charter school can establish a kindergarten program for four-year-old students because the CSL impliedly applies to the School Code Regulations which permits the same. On this basis, the Secretary concluded that the District could not deny payment to a cyber charter school simply because the District did not have a four-year-old kindergarten program.

The District then timely petitioned for review with the Commonwealth Court and in a unanimous *en banc* opinion, the Commonwealth Court affirmed the Order of the Secretary.

At the Supreme Court level, the District asserted that the School Code vests the District with the authority to set kindergarten enrollment age, and since this provision was not made applicable to cyber charter schools under the CSL, the District contends that the discretionary authority to set enrollment age rests exclusively with the District. The District also argued that the Secretary of Education's interpretation that the cyber charter school can establish a kindergarten program for four-year-old students because the CSL impliedly applies to the School Code Regulations which permits the same,

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Limits on Cyber Charter School Funding *Continued from page 3*

is violative of the legislative intent expressed in the plain language of both the Public School Code and the CSL.

Finally, the District also argued that the Secretary of Education's decision contravenes public policy because, if the Secretary of Education's Order is affirmed, cyber charter schools will then be vested with an authority to expend school district funds, public monies raised to the taxing powers of school districts, without the knowledge, consent, or public action of Boards of School Directors. In this same regard, the District also argued that the financial resources available to school districts mandates the reversal of the order of the Commonwealth Court requiring the District to pay for four-year-old's kindergarten entrance into cyber charter school.

On the other hand, the cyber charter school countered that a cyber charter school is granted all powers necessary or desirable for carrying out its charter and because a charter school's application must identify the age level served by the school, the cyber charter school has the authority to set a kindergarten enrollment age. Further, because the PDE's Basic Education Circular on cyber charter schools states that the charter school's kindergarten admission age must be set by the charter school Board of Trustees, the Department has given the cyber charter school the authority to set kindergarten admission at age four (4) if it so desires. Finally, the cyber charter school argued that allowing the District to not pay for a resident pupil's admission to a four-year-old kindergarten program, would infringe upon the cyber school's authority to decide matters related to the operation of the school and would violate the intent of the cyber charter school law by allowing school districts to dictate policies to presumptively independent charter schools.

The Supreme Court of Pennsylvania first acknowledged that a review of the statutory framework indicates cyber charter schools have the ability to set an age or grade level served by the school and therefore, the cyber charter school has the authority to set its enrollment age at four (4) years for admission into its kindergarten program.

The Pennsylvania Supreme Court then further stated that a plain reading of the applicable statutes shows that *both* a cyber charter school and a school district have the ability to set enrollment ages for a kindergarten program. However, they acknowledged that there is a gap in the School Code and the CSL as well as regulations because it is not articulated whether or not it is a cyber charter school or a school district's policy that prevails in the event of a conflict regarding funding. When faced with such a funding conflict, the Supreme Court held that the cyber charter school is bound by the policy of the school district in which the student resides. The Supreme Court stated that "our holding is guided by the recognition that the district's funding obligation is inextricably linked to its duty to provide a public education."

Because the District has no obligation to educate a child before the child meets the school district's minimum entrance age to kindergarten, the District then has no obligation to fund educational programs for a child who otherwise they do not have an obligation to educate. The Supreme Court stated that to hold the District is obligated to fund educational opportunities for students not yet eligible to attend the District's public schools would allow those students who enroll in cyber charter school to receive greater benefits than a similarly-situated student who chooses to attend the public school.

Since a four-year-old resident of the District may not attend the public schools, the District does not have to pay for the child's admission to cyber charter school, and while a cyber charter school may set its own entrance age for kindergarten, the District does not have the commensurate obligation to pay where the cyber charter school's policy does not align with that of the District.

If your district is paying for district residents attending cyber charter school enrolled in a pre-kindergarten program the district does not offer, solicitor consultation is important to understand your district's rights, and obligations, under this new ruling.

Pennsylvania Auditor General Releases Report Regarding District-Funded Meals for School Board Members and Administrative Meetings

In late 2011, the Pennsylvania Department of the Auditor General released a public report regarding Reading School District's meal costs from 2005 to 2008. The audit found that the School District misspent $76,000.00 on dining.

The audit found that between July 1, 2005, and December 31, 2008, the former Superintendent and other high ranking officials at the Reading Area School District used the District's Food Service Department and commercial caterers to provide more than $76,000.00 worth of catered meals for school board meetings, administrative meetings, and social events, expenditures which were wasteful and abusive of taxpayer funds and in violation of the law.

The audit also found that the former Business Manager knowingly and deliberately concealed disbursements from the District's General Fund for catered meals for school board and other administrative meetings by posting said expenditures to the books of the District as purchases of supplies rather than food for the purpose of concealing the expenditures from public disclosure.

The audit cited Section 504 of the Public School Code which provides that regular daily lunches may be provided to pupils, teachers, and school employees of the cafeteria. The audit specifically pointed out that this section of the School Code does not provide support for the proposition that a school district is authorized to spend taxpayer money to provide catered meals for administrative meetings or school board meetings. Further, the audit found that a search of Public School Code has found no other provisions expressly authorizing a school district's cafeteria to provide food to any persons other than students and employees and that the authorization to cater school board and other administrative meetings was not part of the necessary powers of the District to enable them to carry out the provisions of the Public School Code. The audit then concluded that because the School Code does not expressly or impliedly authorize school board members, administrators and others to be fed catered meals at taxpayer expense, the School District's expenditures in this case were wasteful and abusive of taxpayer funds and in violation of state law.

The expenditures for food services and catering came from three different sources. First, catering expenses totaling $43,286.68 were invoiced by the Reading School District Food Service Department due to requests for catering from, in part, School District administrative employees. Second, $14,330.38 was charged to the former Superintendent's School District-issued credit card for catering expenses; and third, $18,416.95 in catering expenses were billed directly from a vendor to the Reading School District's business office during the calendar year.

As a result of the findings of the audit, recommendations were made from the Auditor General's Office. This included the elimination of the practice of ordering catered meals for the board and other administrative meetings and social events from the food service department or outside vendors; the development of formal policies and procedures regarding the use of food service department for any purposes other than expressly as set forth in the Public School Code; to surcharge present and former individual members of the school board and administration for the costs of the catered meals obtained in violation of state law; for the District to use legal means available to seek reimbursement from administrators and board members who obtained catered meals for administrative and board meetings; implementation of a system of controls to ensure that the Business Manager records expenditures in the appropriate category when completing financial reports and financial statements; instituting appropriate legal proceedings against the

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Third Circuit Rules in Favor of a School District on a Title VII Claim

In October, 2011, the Third Circuit decided the case of *Dellapenna v. Tredyffrin/Easttown School District*. A Business Administrator for the School District was an American citizen of Chinese dissent. After an audit of the School District's financing by an outside Auditor, a range of problems with this Business Administrator's account was found. This included over $1,000,000.00 in overstated accrued expenses. Shortly thereafter, the Business Administrator's Supervisor was informed about disconcerting complaints from two employees working under the Business Administrator alleging that she had regularly abused and berated her staff and instructed them to use improper accounting methods. These complaints were documented after the staff members were interviewed.

After the outside Auditor released their report, a separate forensic auditor was brought in and found that the finances were not in conformity with generally accepted accounting principles despite the Business Administrator being aware of this and continuing to disregard prevailing accounting methods without the District's knowledge and approval. The Business Administrator was informed of both the employee complaints about her and the hiring of a forensic auditor to complete a report.

The day after the forensic auditor released their report, the Business Administrator complained to the Superintendent that she had been subjected to a hostile work environment and had been mistreated because of age, gender, race, and ethnic background. The School District then investigated these claims in accordance with school district policy and found no basis for them.

After the investigation, and based on the outside Auditor's report, the School District proceeded with termination of the Business Administrator's employment citing willful, wanton and gross misconduct as well as material and substantial dishonesty. The Business Administrator was told of her right to a hearing, but she declined knowing that her failure to request a hearing would result in immediate discharge.

The Business Administrator then filed suit under Title VII for racial, gender and age discrimination and retaliation alleging that her discharge was completed too quickly after her complaints of discrimination.

The Third Circuit upheld the District Court's dismissal of her claims and found that there was an overwhelming amount of evidence that the School District termination of the employee was for a legitimate, non-discriminatory reason, including, the intentional misstatement of accounting records and ordering her subordinates to intentionally misstate accounting records. Specifically, the Third Circuit found that even though there was a close temporal proximity between her complaints of discrimination and termination, they could not ignore the overwhelming evidence of the scrutinization of the Business Administrator's managerial and accounting practices that began prior to her complaints of discrimination.

This case is a good example of a situation wherein an employee attempts to receive protection from an anti-discrimination statute when a termination is about to occur. Provided there is objective evidence to support the termination of employment, districts need not shy away from termination, and should consult their solicitor to assure that all proper documentation and objective evidence is in place prior to termination.

Disclosure of Public Officials' Emails

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"deliberation" of township business pursuant to the Sunshine Act because the township's open records officer must first determine through a good faith review if these requested emails were exchanged for the purpose of deliberation of the township's business by a quorum of the supervisors within the meaning of the Sunshine Act.

The Commonwealth Court ultimately vacated the trial court's orders and remanded the matter to direct the township's open records officer to fulfill his duty under the Right-to-Know Law by making a good faith determination of (1) whether the information requested is a public record; (2) whether the township had possession, custody, or control of the records; and (3) whether the records were exempt or subject to a privilege.

This serves as an important case with regard to both the Right-to-Know Law and the Sunshine Act. School board members cannot assume that personal emails amongst and between other board members will be protected from the Right-to-Know Law. Further, this decision also means if emails are exchanged between a quorum of school board members for the purpose of deliberation, they may be considered a public record. If so, there could also be implications of violation of the Sunshine Act.

As such, board members should be conscious of email exchanges for the purposes of deliberation among a quorum of board members as the same could be subject to Pennsylvania's Right-to-Know Law and could be violative of the Sunshine Act.

Report Regarding District-Funded Meals

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former Business Manager for entering false information in the annual financial reports submitted to the Department of Education; instituting appropriate legal proceedings against the former Superintendent for certifying and signing false information in the financial reports that were submitted to the Department of Education if it is able to be determined that he was, or should have been, aware of the false information; and requiring its current and future superintendents to perform appropriate due diligence before signing financial reports and similar documents prepared by subordinates.

The final recommendation states that a copy of the public report was being sent to the Pennsylvania Department of Education with the recommendation that it should investigate the false reporting and concealment of the catering expenses in the Annual Financial Reports and take further action it deems appropriate.

School districts should be aware of the findings and recommendations of this report, and consult with their solicitors accordingly if they have questions or concerns about the practices currently occurring, or that are permitted, within their own 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.

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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. James P. Hartman at jph19@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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