

Commonwealth Court Rules that Student Cannot be Disciplined for Off-Campus, Crude Language

By Nicole W. Williams, Esq.

On June 30, 2020, the Third Circuit Court of Appeals affirmed an earlier district court decision in *B.L. by and through Levy v. Mahanoy School District*, holding that a student's Snapchat post which occurred off-campus and on a weekend was protected speech under the First Amendment of the U.S. Constitution, the student did not waive her First Amendment protections and as a result, the student could not be disciplined for the speech.

In 2017, student B.L. made the junior varsity cheerleading squad at Mahanoy Area High School ("MAHS"), a school located in Schuylkill County, Pennsylvania. B.L., upset that she did not make the varsity cheer squad, vented her frustrations on a Saturday, while at a local store with a friend, by posting a photo to Snapchat which was visible to approximately 250 of her friends, many of whom were fellow MAHS students and some of whom were cheerleaders. The photo depicted B.L. and her friend, both with their middle fingers raised, with the caption "f*** school f*** softball f*** cheer f*** everything."

Cheerleaders at MAHS were required to acknowledge the team rules which included requiring cheerleaders to "have respect for [their] school, coaches, ... [and] other cheerleaders"; avoid "foul language and inappropriate gestures"; and refrain from sharing "negative information regarding cheerleading, cheerleaders, or coaches ... on the internet." Because the video referenced the school and its activities and included an obscene gesture and language, the cheerleading coaches at MAHS immediately removed B.L. from the cheerleading squad. This discipline was upheld by the school but overturned by the district court which found that the school had violated B.L.'s First Amendment rights by removing her from the JV cheerleading squad.

In its decision affirming the lower court's ruling, the appellate court found that the speech was off-campus speech because the post was created off school grounds, not during school time, without school resources, and on an app unaffiliated with the school district. The fact that the post referenced the school and reached fellow students and coaches was not enough to bring the speech "on campus." The court declined to impose a balancing test on the speech and further opined that it did not matter that the discipline was to exclude from an extracurricular activity because discipline, whatever the form, cannot be used to control student free speech in a realm that is normally beyond regulation. Furthermore, the court declined to extend the "substantial disruption" test from *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), to off-campus speech. Importantly, the court also found that B.L. did not waive her First Amendment rights where such a waiver must be voluntary and knowing. As such, the court found that the post was protected First Amendment speech for which B.L. could not be disciplined.

This case draws an important distinction between foul language being used by a student off-campus and language used by a student to bully, harass or threaten another student or the school. School administrators should contact legal counsel with any concerns regarding student expression, particularly during times when students are participating in school activities virtually.



Nicole W. Williams

PA Class Action Lawsuit Filed Regarding Denial of FAPE During COVID-19 School Closures

By Emily H. Hammel, Esq.

On May 18, 2020, a class-action lawsuit was filed in the U.S. District Court, Eastern District of Pennsylvania on behalf of nonverbal and partially verbal elementary students who did not receive their required special education services due to mandated COVID-19 school closures. Plaintiffs allege that Pennsylvania Governor Tom Wolf, Education Secretary Pedro Rivera and the Pennsylvania Department of Education have violated Plaintiffs' rights under the Individuals with Disabilities Education Act ("IDEA"), Section 504 of the Rehabilitation Act ("Section 504") and the Americans with Disabilities Act ("ADA") because Governor Wolf's failure to include in person instruction for nonverbal and partially verbal children with autism as a "life-sustaining" business, permitted to operate during the pandemic, has denied Plaintiffs the opportunity to receive FAPE, or a Free Appropriate Public Education, as entitled under the law.

Despite the school closures ordered by Governor Wolf during the COVID-19 pandemic, the Department of Education did not recommend any additional federal waivers concerning FAPE and Least Restrictive requirements of the IDEA. Instead, the Department of Education reiterated that learning must continue for all students during the COVID-19 emergency. Plaintiffs were only offered online learning consisting of limited video meetings with teachers and therapists. Such meetings proved challenging for

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Emily H. Hammel

Background Check Requirements for Independent Contractors: Clarification from the Commonwealth Court

By Lisa M. Colautti, Esq.

On October 19, 2019, the Commonwealth Court issued a decision in the case of *United Union of Roofers, Waterproofers and Allied Workers v. North Allegheny S.D., Fox Chapel S.D. and Montour S.D.*, 220 A.3d 709 (Pa. Cmwlth. 2019). Under this ruling, it is clear that independent contractors who have “direct contact with children” as defined by the School Code, must provide complete background checks to the school entities where they perform the work.



Lisa M. Colautti

In 2015, the Roofers’ Union brought suit against North Allegheny School District, Fox Chapel Area School District, and Montour School District (Districts) alleging that roofing contractors were exempt from School Code provisions requiring background checks for employees, volunteers and independent contractors who have direct contact with children. Although direct contact with children is not defined in Section 111 of the School Code, it is defined elsewhere in the Code as “the possibility of care, supervision, guidance or control or routine interaction with children.”

The Roofers’ Union was awarded contracts at each District to either renovate existing schools or to build a new school on an existing campus. Background checks were required as part of each contract. When the building projects began, several individual roofing contractors were denied access to school sites based on their criminal records which were determined to be in violation of Section 111 of the School Code. Districts presented evidence to the trial court that roofing contractors were in direct contact with children on school grounds, were able to use restrooms in school buildings, and were in close, unsupervised proximity to students during evening and summer activities.

The trial court ruled in favor of the Roofers’ Union and Districts appealed the decision to Commonwealth Court. The court held that school entities may conduct background checks on independent contractors who have direct contact with children as permitted by the plain language of the School Code. Additional claims were later withdrawn by the Roofers’ Union and the case is now final.

This decision reiterates that independent contractors who have the possibility of care, supervision, guidance or control or routine interaction with children are subject to the same FBI, State Police, and Child Abuse background checks and Employment History Reviews as school employees. Our office is happy to assist with any questions you may have regarding this case or clearances in general.

PA Class Action Lawsuit, *continued*

students who are nonverbal or partially verbal. Additionally, Plaintiffs’ online education was 75 minutes per week, as opposed to the 32 and 1/2 hours per week of hand-over-hand instruction students were receiving prior to school closures. Furthermore, Plaintiffs allege the online plan was not consistent with Plaintiffs’ IEPs and posed significant risk for regression resulting in a decrease in overall functioning and skill level.

While the suit is not filed against the school district itself, the outcome of this case may impact future due process litigation involving COVID-19 school closures. Be on the lookout for updates on the status and eventual outcome of this case and what impact any ruling may have on special education programming and future due process matters.

Compliance Alert: New Title IX Regulations

By Amanda B. Jewell, Esq.

On May 19, 2020, the Secretary of Education amended the regulations implementing Title IX of the Education Amendments of 1972. These changes will be effective as of August 14, 2020.

The primary focus of the new Final Rule is an increase in due process and substantive legal protections for those accused of violations, a narrowing of scope of sexual harassment and liability, and expanded requirements pertaining to Title IX officials at a school district, including training. School administrators must ensure compliance with the new obligations by the upcoming deadline.



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This issue of In Brief: School Law Update is meant to be informational and does not constitute legal advice. Should districts wish legal advice on any matter, they should contact their legal counsel or request a legal opinion from Weiss Burkardt Kramer LLC.

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We’re Speaking...

- On July 30, 2020, Attorney Ira Weiss and Attorney Annemarie Harr Eagle will be providing a legal update at the PACTA Annual Conference.
- On August 17, 2020, Attorneys Aimee Zundel and Annemarie Harr Eagle will be presenting at PBI’s “Snapshots of Special Education Law.” Attorney Harr Eagle will speak on Special Education Statute of Limitations Issues while Attorney Zundel will present on Anxiety and School Phobia.
- Attorney Lynne Sherry will present on the topic of AEDY at PBI’s “Current Issues for Child Advocates” CLE currently scheduled to be held virtually in October 2020.