BEARD LEGAL GROUP

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Judge Reverses Board's Decision to Expel Student

In J.S. v. Manheim Twp. Sch. Dist. (February 25, 2019), Lancaster County Court of Common Pleas Judge Leonard Brown III reversed the District's decision to expel a male student for threats via Snapchat after school hours and off school premises. J.S. was brought up on administrative charges of violating the District's Terroristic Threats and Cyberbullying Policy. In this case, JS sent three (3) Snapchat snaps to a student (Student 1) about another student (Student 2). The "snaps" occurred over a period of at least 10 days with J.S. telling Student 1 how Student 2 is like a school shooter and will probably shoot up the school. Putting it all in perspective, looking at the District's terroristic threat policy, Judge Brown stated "The only portion of this definition relevant to the School District's adjudication is whether J.S. communicated 'a threat to commit violence' to Student 1 'with the intent to terrorize him.'" Judge Brown relied upon the Knox case in analyzing the facts in this case.

In Commonwealth v. Knox, 190 A.2d 1146 (Pa. 2018), the defendant was charged and convicted in a bench trial of terroristic threats and witness intimidation stemming from rap lyrics which referred to certain City Police Officers who were scheduled to testify against him. The Knox case is a very comprehensive and complicated case looking at First Amendment speech rights and covering a number of cases in other Circuits and states relative to weighing the impact of speech and whether the perpetrator's actions really were a "true threat." The Knox case is a genesis case in Pennsylvania for a "true-threat" analysis.

Judge Brown summarized the contextual circumstances the Knox court established for evaluating whether the speaker acted with an intent to terrorize or intimidate looking at six considerations or factors in rendering his decision. Those factors are as follows:

(1) whether the statement was an "actual threat" versus "political hyperbole";
(2) whether the full context of the discussion was one that "often involves inexact and abusive language";
(3) "whether the threat was conditional";
(4) whether the threat "was communicated directly to the victim";

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Inside …

When Parents Become Aggressive

In this particular case, OCR was investigating a complaint that a Washington State School District retaliated against the parent when it implemented a parent communication plan. It was reported that the parent yelled at staff members, made them feel unsafe, and sent numerous demanding emails. Per the case, staff members complained about the contentiousness of the parent's conduct and the burdensome nature of her emails.

As a result of same, the CEO of the Academy informed the parent she would be required to contact the Principal or CEO whenever she wanted an in-person meeting with staff. In addition, this communication plan also made the Principal the single point of contact for the parent's emails.

In the end, OCR determined that the school had legitimate reasons for regulating how the parent and school communicated. In other words, there was a legitimate non-discriminatory reason for the conduct as opposed to retaliating against the parent for her claims that her son's 504 plan was not being implemented.

Schools need to consult with their Solicitors or Special counsel before developing policies or immediately going after parents for perceived bad behavior/poor form to avoid a retaliation claim. For any school entity contemplating developing a policy or writing letters to parents regarding single points of contact or restricting their ability to come onto school district property, the school is encouraged to read the case of Easton Unified School District #449, (KS 3/8/2018). In this particular case, the parents of a 9 year old student could not demonstrate that the Kansas District's restricting her access to campus and school staff was in retaliation for advocating on her student's behalf. In the end, OCR found that the District's stated reasons for banning the parent were legitimate and nondiscriminatory.

In this case, there is a good overview of how the District instituted a ban on the parent, provided specific requirements for how she could meet with teachers, principals, and visit the school. The case contains the letter that was sent by the Superintendent to the parent containing nine specific points regarding school visits and communications with district personnel. It also contains a letter from the District Solicitor to the parent further reiterating the restrictions. The case is a good read providing an overview of numerous bans and restrictions being placed upon the parent from 2008-2009 school year up through 2014-2015.

The case also provides an overview of the District's policies. The District's policy provided in pertinent part as follows:

> *The board encourages patrons and parents to visit district facilities. Patron visits shall be scheduled with the teacher and the building principal.*
>
> *Notices shall be posted in school buildings or require visitors to check in at the office before proceeding to contact any other person in the building or on the grounds.*
>
> *Any person who visits a building and/or grounds of the district will be under the jurisdiction of the building principal who shall be responsible for developing rules and regulations governing the presence of visitors in the buildings.*
>
> *The principal has authority to request assistance from law enforcement if any visitor to the district's buildings or grounds refuses to leave or creates a disturbance. Violation of this rule may lead to removal from the building or grounds and denial of further access to the building or grounds. Violators of this board policy may be subject to state trespass law.*

All schools are encouraged to have a school visitation policy that may or may not have administrative regulations or procedures associated with same.

Polices/procedures and/or protocols regarding restricting communications should be reviewed by the District Solicitor or Special Counsel before being implemented. Timing of such policies may also be critical so as not to create a situation where the District gets accused of retaliating against a parent who is advocating on behalf of their child.

When All Else Fails

In Forest Grove School District v. Student (2018). The US District Court, District of Oregon, reversed an Administrative Hearing Officer's finding that an email protocol set up by the District impeded the parents' participation in an IEP process. After reviewing all of the facts and evidence in the this case, US Magistrate Judge held that the District's adoption of a communications protocol did not violate the IDEA. The parent argued that the District's communication protocol limited her ability to email school staff but in the end she could not demonstrate that the protocol impeded her participation in the IEP process.

In this particular case, the Magistrate Judge explained that while parents have the right to participate in the IEP, they do not have the right to unlimited communication with school staff. According to the decision, the Judge found reasonable restrictions on communications may be appropriate when a parent sends an excessive number of emails or uses inappropriate tone.

The policy in question limited the parent to one weekly email to the student's case manager which according to the record was able to address all of her concerns about her child's educational programming and services.

Once again, this is one of those situations that before the district would adopt such a policy, they need to check with their Solicitor and/or Special Counsel to insure that they either do not retaliate against the parent advocating on behalf of their child or otherwise restrict their participation in the IEP process or the educational programming of his/her student.

Pennsylvania District Sued After District's Police Officer Abandoned Elementary School Student

The City of York School District was sued in the Middle District Federal Court by the parent of an elementary student claiming the school officer abandoned his son at an empty home. According to the Federal Complaint, the officer drove the student home during an early dismissal due to a snow storm but remained in his vehicle allowing the student to enter the home without checking to see if anyone was there. The father claims an unidentified staff member at the school informed him that an early dismissal would probably occur when he dropped his son off in the morning. According to the Complaint, the school usually has an early dismissal around 1:30 p.m. but in this instance school was dismissed at 12:30 p.m. that. According to the Complaint, when the father arrived at school to pick his son up at 1 p.m. the same officer who drove the student home informed the father that he had already taken his son home. The father, knowing no one was home, immediately drove to his house. The father arrived home at approximately 15 minutes later. Per the Complaint, the student was found in the living room on a couch with his coat still on in the fetal position crying. The Complaint alleges the officer did not get out of his vehicle and merely watched the male student walk to the front door and enter the house.

The lawsuit alleges the school's police officer exhibited a "willful disregard for [the student's] safety and wellbeing" leaving him "abandoned without supervision" at the home. It is also alleged that the student suffered anxiety, mental anguish and fear and fright and past and future mental pain and suffering.

The takeaway in this case is once again common sense and good judgment must be exercised at all times. While some may say that "no good deed goes unpunished" in this particular case a reasonable person would not have allowed the student to get out of the car and walk into the house without assuring someone was home so that the student could be supervised.

If students are, in fact, going to be driven home, through a personal escort or a ride in a police vehicle, then that individual should undertake reasonable steps to protect the safety of the student.

Ask Before Sending

In Patrick ex rel. AG v. Success Academy Charter Schools, Inc. (E.D.N.Y. 2018)(-) the charter school removed a child with a disability to an IAES on two occasions for "allegedly" inflicting serious bodily injury on school employees. At the end of the day, the District could not sustain the burden of demonstrating that the child had really inflicted serious bodily injury on another person. In this case, the parent challenged both reports that were made relative to removing their child for up to 45 school days from the school setting.

The first incident alleged that the 6 year old child dragged the assistant principal down the hall by her hair and inflicted extreme physical pain. The second situation involved an allegation that the student stabbed his paraprofessional in the eye with a pencil that required her to be removed for treatment at a local hospital.

In the end, the Court permitted the parents to proceed on:

1) ADA, Rehabilitation Act retaliation discrimination claims
2) Fourteenth Amendment due process (failure to hold a due process hearing)
3) IDEA (misuse of serious bodily injury exception)
4) IDEA (deprivation of due process).
5) Fourteenth Amendment due process (sufficiency of evidence)
6) IDEA (Adequacy of the IAES).

Takeaway: If a school is ever in doubt as to whether the student's actions rose to the level of "serious bodily injury", they should immediately contact the Solicitor and/or Special Counsel.

Special Education In Brief

Moving forward we will include a short overview on terms or provisions of the Individuals with Disabilities Education Act (IDEA) and its implementing regulations to provide Administrators and School Board Members with additional information to get a better understanding of some of the terms often included in overviews of special education cases. **This edition's featured term is Manifestation Determination Review (MDR) Process.**

If a student with a disability commits a violation of a school district's code of conduct and the school district seeks the child's removal for more than ten consecutive school days, the district must conduct a manifestation determination to determine whether the misconduct is a manifestation of the child's disability. See 34 CFR §300.536. As part of the manifestation determination, the local educational agency, the parents, and relevant members of the child's IEP team must "review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents" to determine if the conduct in question (1) was caused by, or had a direct and substantial relationship to, the child's disability, or (2) was the direct result of the local educational agency's failure to implement the child's IEP. 20 USC §1415(k)(1)(E)(i).

A manifestation determination review must be conducted within ten days of any decision to change the placement of a child with a disability as a result of a code of conduct violation. 34 CFR §300.530(e)(5).

Student's Misconduct was Not a Manifestation of His Disability

In the case of Henry County School District (GA 2018), an Administrative Law Judge upheld the District's decision to suspend and remove the student to an alternative placement. The student in question was diagnosed with emotional disorder, autism, and oppositional defiant disorder. Student was involved in a situation involving physical aggression. Ultimately, the Hearing Officer determined that the District properly jumped through the appropriate hoops at the manifestation determination review (MDR) meeting. The Hearing Officer felt it was critical in the analysis

that when the student had been approached before about wearing a hoodie and a hat in school and being asked to remove it, the student responded "I can do what I want." After the winter break, the teacher noticed the student looked upset and asked him how he was feeling. In response to same the student stated "You thought you saw crazy, you ain't seen crazy yet."

It is also critical in this case to note the time of day when the student engaged in many actions. In this particular case the action occurred at 12:30 p.m. According to the notes in the student's Functional Behavioral Assessment, little or no incidents were recorded during the period from 12:00 p.m. to 1:00 p.m.

According to the Hearing Officer, after reviewing the entirety of the record, multiple factors suggested that the student's misconduct related to his ODD diagnosis was not a manifestation of his disability. According to the Hearing Officer, the statement to the teacher "You thought you saw crazy, you ain't seen crazy yet" suggested he was contemplating future misconduct. In addition, the student was able to stop his aggressive behavior upon a male teacher's redirection.

According to the Hearing Officer, the student appeared to be smiling and calm and not highly emotional. According to reports, before throwing another student to the ground, the student accused of the misconduct paused and looked around.

This case is a very good read in regard to appropriate steps the District undertook to deal with the student and undertaking the MDR process.

Judge Reverses Board's Decision

...Continued from front page

(5) "whether the victim had reason to believe the speaker had a propensity to engage in violence"; and,
(6) how the victim reacted to the statement.

Applying those factors in a "true-threat" analysis, Judge Brown concluded there was not substantial evidence of record to support the expulsion of J.S. At the expulsion hearing, Student 1 was not available to testify and the Judge outlined that in Pennsylvania, School Boards do not have the ability to subpoena student witnesses at an expulsion hearing. The Judge did a great job analyzing the burden by which a School District must prove its case.

At the expulsion hearing, J.S. was represented by an attorney who objected to any testimony coming in regarding what was stated to Student 1 unless Student 1 was there to actually testify. The Board's Disciplinary Committee found that J.S. privately sent three Snapchat images to Student 1 and used the post to make it appear that Student 2 was threatening a school shooting but that Student 2 was unaware his image was being used by J.S. In his decision, Judge Brown wrote:

Due process requires that J.S. have the right to compel the attendance of witnesses identified by the School District in its case against him. The failure of Student 1 to testify and be subject to cross-examination, through no fault of the school board, violated the constitutional rights of J.S. The right of J.S. to attend public school cannot be taken away from him without "fundamentally fair procedures to determine whether the misconduct has occurred." Goss, 419 U.S. at 574.

While Pennsylvania has created procedures that are facially fundamentally fair, the procedures lack a legal remedy for compelling a recalcitrant witness to appear at his hearing. "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures – Boards of Education not excepted." Id., (quoting W.Va. Bd. Of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

Practice Note: This is a must-read for any Administrator within the Commonwealth of Pennsylvania and certainly must be viewed in its totality as it relates to any case involving potential First Amendment free speech claims where student safety is in play and administrative charges are brought under a District's Terroristic Threat Policy. This case also demonstrates the importance of live witness testimony in a student expulsion hearing. Failure to have the proper witnesses available to corroborate the charges and speak to the evidence could compromise an otherwise winnable case.

NEWS FROM ACROSS THE NATION:

US Court of Appeals Overrules Federal District Court Allowing Two Male Students to Participate on Their School's Competitive Dance Teams

According to the case, two male students were being denied the opportunity to participate in their school competitive dance teams because the Minnesota State High School League (MSHSL) by law limited participation on the schools' competitive dance teams to females. According to the bylaws, the reason for this limitation is that girls' overall athletic opportunities have previously been limited whereas boys have not. The suit was filed alleging that both Title IX and the male students' rights to equal protection under the Fourteenth Amendment were being violated.

Ultimately, the Court stated "Because the League has not asserted an 'exceedingly persuasive' justification for keeping boys from participating on high school competitive dance teams, we hold that the boys had more than a fair chance of prevailing on the merits of their case. The district court erred in concluding otherwise."

In this case, like many others where male athletes are denied access to all-girl teams, demonstrates that before throwing down the gauntlet the school district needs to extensively research and inquire from their Solicitor what the implications would be before denying participating on what has been categorized as "all-girl."

In this case, the Court mentioned that in many sports, single sex sports can be justified if boys enjoy a competitive advantage over girls due to their weight and height. In this case, the League did not present any evidence, and does not seem to seriously argue, that boys enjoy any competitive advantage over girls in dance.

The Court stated, given the lack of justification for the League's policy, the boys could meet the "likely-to-prevail" standard if it were applied in this case.

Connecticut District Finds Student's Conduct Was Not a Manifestation of His Disability

In Connecticut Technical High School System, 73 IDELR 109 (CTT, 2018), at the manifestation determination review (MDR) meeting, the District held that a 16 year old male student's conduct in applying numbing cream to a teacher's drinking straw was not a manifestation of his disability and they were permitted to in fact suspend him for that conduct.

In this case, the 16 year old student put numbing cream on the straw of a cup in a classroom sink. The teacher was not aware the straw had been tampered with. Although the student was diagnosed with ADHD, depression and anxiety, the student had no history of impulse control. The student was not able to introduce any evidence supporting that his impulsivity was the reason for applying the numbing cream to the teacher's drinking straw.

The key in any situation is to go to the manifestation determination review meeting in the first instance to ascertain if the student's conduct was, in fact, an outgrowth of his disability. In this case, the District was able to demonstrate the claims by the student that his conduct and actions were related to his disability were unfounded.

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SAVE THE DATE

The Pennsylvania School Study Council,
Penn State College of Education,
Penn State Law School,
and the Partners of Beard Legal Group
invite you to join us for-

Education Law Day 2019
Wednesday, September 25, 2019
8:30 a.m. – 3:00 p.m.
At Penn Stater Hotel Conference Center
University Park, Pennsylvania

Speakers

Coordinated by Beard Legal Group

Carl P. Beard, Managing Partner
Elizabeth Benjamin, and Ronald N. Repak, Partners
Sarah M. Castillo, Assistant Chief Counsel for PA Department of Education
Dr. David Bateman, Author and Professor of Special Education at Shippensburg University

Excellent messages for school leaders and for school board members
Registration Information will follow soon.

Directions and additional information will be sent to the all registrations.
Open parking is available at the Penn Stater Hotel Conference Center.

Beard Legal Group Education Law Focus

As solicitors, labor counsel and special counsel, Beard Legal Group represents more than 80 School Districts in Pennsylvania. The Firm has successfully negotiated hundreds of teacher and support staff contracts.

The Firm also represents a large area of the State for coverage of school board directors through their insurance carrier.

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About the Pennsylvania School Study Council

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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