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Joint Custody Results in Double Transportation Obligation

Recently, in the case of *Watts v. Manheim Township School District,* the Court of Common Pleas granted a father's petition for a permanent injunction, and ordered the school district to resume busing services for his child. The father has joint physical and legal custody of C.W., a student at Manheim Township Middle School. C.W. spends alternating weeks with each parent. Both parents reside in Manheim Township, but on different bus routes.

Prior to the 2011-12 school year, Manheim Township provided transportation to eligible students to and from multiple locations. Due to significant operating expenses, Manheim Township amended its transportation policy, eliminating transportation of students to and from multiple locations. Beginning with the 2012-13 school year, Manheim Township strictly enforced the policy, and informed the father that C.W. would no longer be transported from his home to school. C.W. continued to be transported from his mother's home to school.

When C.W.'s father's attempts to have busing services restored at the local level failed, the father filed a complaint for injunctive relief. Manheim Township argued that it is entitled to discretion in implementing a transportation protocol. The Court found that a bus from C.W.'s school has available seats, already serves both homes, and could accommodate C.W. without any further cost or adding an extra stop. The Court determined the father is experiencing irreparable harm by the withdrawal of transportation and that it could restore the status quo by reinstating transportation. Since the Court concluded that C.W. is a "resident pupil" of Manheim Township under Section 1361 of the Pennsylvania Public School Code, the Court held that Manheim Township is statutorily required to provide transportation for C.W. between both parents' homes and his school. Based upon the specific factual circumstances and the deprivation of a statutory entitlement, the Court determined injunctive relief was warranted.

This case involves the following issue: Whether a child, whose time is evenly divided between separated parents who both reside in the school district but on different bus routes, is entitled to receive transportation services between the parents' homes and the child's school. In the *Watts* case the Court of Common Pleas of Lancaster County granted the father's Petition for a Permanent Injunction, and ordered the School District to resume busing services.

On appeal, Commonwealth Court affirmed. Relying on *In re Residence Hearing Before Bd. of Sch. Dirs., Cumberland Valley Sch. Dist. (Thane)* and *Wyland v. West Shore Sch. Dist.* for the proposition that "a child can have more than one residence for school purposes" and statutory language from Sections 1361, 1362, and 1366 of the Public School

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YOU ARE INVITED!

Andrews and Beard
Education Law Symposium
March 20, 2014
Blair County Convention Center

See Page 3 for details!

Is A Voluntary School Merger a Good Idea?

School officials have laid the foundation for what would be the first voluntary merger of two school districts in Pennsylvania. The decision to merge two Beaver County school districts into the newly formed Central Valley School District would prove a groundbreaking one for educators across the state. As the Exeter and Antietam districts debate the merits of a merger, they can look to Central Valley to understand the challenges and opportunities they would face. Two and a half years after Central Valley graduated its first class in 2011, it remains the first and only voluntary merger among Pennsylvania school districts.

Between its two farthest points in Potter Township and Monaca Borough, the Central Valley School District spans about seven miles. Through sports, scouting and other activities, students were closely connected when the two districts came together. At the time of Central Valley's merger, both schools were facing declining enrollments. During the 2008-09 school year, the Center School District had approximately 1,850 students. Monaca, a borough with 20 percent of its population over the age of 65 in 2010, had an enrollment of just 650.

The declining enrollment numbers mirrored the trend across the rest of Beaver County, which over the last decade saw its school-age population decline from 35,795 in 2000 to 30,193 in 2010. There are 14 school districts in Beaver County. Central Valley now averages approximately 200 kids in a grade. Monaca at the time was between 30-40 kids in a class.

With that dwindling school population across the county, the Districts decided that when there is such incredible overlap, there is spending on duplicate services that don't actually impact the education of children. According to the Berks County newspaper, at Monaca, school officials were faced with aging buildings in need of major renovations and had the merger not happened, a hefty tax increase would have been necessary, according to Matsook, who served as the first superintendent of the new Central Valley School District.

In the 1960s a mandated merger reduced the number of Pennsylvania districts from 2,277 to 669. The Districts used this idea to be proactive and control which districts were going to merge. In September 2008, school boards from Center and Monaca jointly approved the merger. The Central Valley name was selected through a communitywide online survey, with students suggesting and voting on color combinations for the new district. The first year of the full merger, 2010, the newly formed Central Valley Warriors won the AAA WPIAL football championship. This was a new class of competition for a new team: Monaca's football team previously had competed in Class A, and Center in AA.

Section 1311 of the Pennsylvania Public School Code designates that the board of school directors of any school district may, on account of the small number of pupils in attendance, or the condition of the then existing school building, or for the purpose of better gradation and classification, or other reasons, close any one or more of the public schools in its district. Upon such school or schools being closed, the pupils who belong to the same shall be assigned to other schools, or upon cause shown, be permitted to attend schools in other districts.

Transportation *Continued from page 1*

Code, the Court concluded that a school district that elects to provide transportation services is required to provide transportation services to and from a child's residence or a designated bus stop within one and one-half miles from the residence, and where a student has two residences the school district must provide transportation services accommodating both residences.

In *Watts,* the parents shared joint physical and legal custody. Thus, it could be argued the "two residences" rule only applies to 50/50 custody arrangements, but the language has now become quite broad as a result of this decision. In footnote seven of the Court's opinion, the Court states that, "Nevertheless, to the extent the School District's transportation protocol eliminates other bus stops, such as to daycare or after-school activities, it does not violate the School Code as there is no requirement to provide transportation services other than between school and the pupil's residence. Thus, the School District's decision to eliminate these stops falls within its permitted discretion."

This decision emphasizes the need for School Districts to review their transportation policies when attempting to deal with dual residence issues. School Boards need to look at all factors and contact their solicitor in handling these disputes.

Court of Appeals Forces Districts to Revamp Free Speech Policies

In the wake of a Court of Appeals decision in case of *K.A. v. Pocono Mountain School District, 710 F.3d 9*, some school districts were served with letters from the Alliance For Defending Freedom Association concerning some school districts' policies. This case dealt with an elementary school student who brought action against the School District alleging that the District violated the student's First and Fourteenth Amendment rights by prohibiting her from distributing invitations to her classmates for a Christmas party at her church. The case was decided March 12, 2013, and the Court held that the lower court appropriately applied the *Tinker* (substantial disruption) analysis, rather than forum analysis (time, place and manner); the District failed to identify any disruption caused by student's speech; and District policies relied upon in prohibiting student's speech were unconstitutional as applied.

Specifically, the Alliance For Defending Freedom Association targeted School District policies permitting dissemination to or by students or staff members of "only literature and materials directly related to school district activities or that contribute significantly to district instructional programs." The Court found that such policies were unconstitutional as applied to the elementary school student's speech in distributing invitations to a Christmas party at her church; policies were broader than what was allowed under *Tinker,* under which student expression could be regulated only if it causes disruption or interferes with rights of others or if it falls into one of narrow exceptions to that rule.

The invitation was a flyer prepared by the church, distributed by K.A., and stated the following:

> iKidz ROCK, Night Christmas Party, Just for KIDS! (Grades K–6), Friday, December 10th, 6:45–8:30pm, Face Painting, Ping Pong, Foosball, Cup-Stacking, Games, Prizes, Puppets, Music, Snacks, and more! Admission and all activities are free! BRING A FRIEND! INNOVATION CHURCH, Pocono.

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Andrews and Beard
Education Law Symposium
Thursday, March 20, 2014
Blair County Convention Center, Altoona, Pennsylvania

5:00 to 6:00 p.m. Registration
6:00 p.m. Dinner
7:00 p.m. Program

This program is for Board Members, Superintendents and other School Administrators and is intended to assist School Districts in avoiding or reducing their exposure to legal liability.

- **Guest Speaker**, Witold Walczak, Legal Director, American Civil Liberties Union of Pennsylvania, *First Amendment Issues Impacting Schools*
- David P. Andrews, Esquire, *Collective Bargaining and Labor Relations Update*
- Carl P. Beard, Esquire, *Recent Developments in Educational Law*
- Elizabeth A. Benjamin, Esquire, *Right to Know and Sunshine Law Update*
- Ronald N. Repak, Esquire, *Challenges to School District Policies and Defending Against Same*
- Brendan J. Moran, Esquire, *What Every School District Needs to Know About Tax Assessment Appeals*

For more information and to register, please contact Regina L. Fisher, Legal Assistant, at 814-943-7926 or by email at rfisher@andrewsbeard.com
(There is no charge for the program.)

Area School Boards Not Using Web to Vet Potential Employees

Recently in *The Sunday Dispatch* a question was asked of local School Districts as to whether they use the internet in order to vet potential employees, whether they are teachers, support staff, etc. The response to this question by most School Districts was an emphatic "no."

As technology advances and social media evolves, Districts may want to look to the web in order to vet potential employees. The article went on to state that several Districts are considering adding web reviews to elicit background checks in the wake of the dust-up around the Wilkes-Barre Area teacher issue regarding a racy video, in which she appeared, surfaced while she was on unpaid leave from the District.

By law, all teacher candidates go through fingerprinting, State Police and FBI criminal checks. Whereas most Districts will in fact do a web search for individuals who hand in résumés from outside of the area, it is uncommon for Districts to do web searches on all individuals. Keeping in mind such searches generally do not include visiting social media sites, such as Facebook, or doing broad searches by simply typing a name in. Advancements in web-adapted vetting tools are being considered for use in the vetting process by more and more Districts.

Newspaper archives, résumé tools and background checks on references given is still utilized by most Districts as the ultimate tool in vetting potential employees. A question that is raised by such web searches concerns privacy and relevancy in the vetting process. Most information that can be sought on the web is password protected and/or private and not able to be accessed by District Administrators. The other issue Districts face is accuracy and whether or not the pictures and/or information has been modified or altered by third parties and is either untrue or mischaracterized.

PSBA Senior Director of Communications, Steve Robison, said that while his organization helps Districts draw up hiring policies, it did not address the notion of web searches.

Due to economic difficulties within Districts and the cumbersome process in vetting online, most Districts have undertaken the realization that such web searches are just not feasible. In moving forward, if a District would consider doing web searches, it is recommended that before doing something such as a web vetting process that School Boards work closely with their Personnel Director and Solicitor to make sure the procedures they adopt are in fact legal.

Controversial Law Allows Audio Surveillance on School Buses

On February 4, 2014, the Governor signed Act 9 of 2014, which authorizes school districts to use audio surveillance equipment to monitor school buses and school vehicles without running afoul of Pennsylvania's wiretapping law. This legislation, which becomes effective immediately, ends the debate whether it is legally permissible for school districts, and their school bus contractors, to use video surveillance cameras with audio recording capabilities.

Act 9 makes clear now that school bus surveillance cameras on school buses and school vehicles, may record video and sound without violating Pennsylvania's criminal wiretapping statute, if a school district complies with all of these requirements:

1. The district's board of school directors adopts a policy that expressly authorizes such audio recordings on school buses and school vehicles for disciplinary or security purposes;
2. The school district annually notifies its students and their parents/guardians of this policy by mailing a letter to the students' home addresses; and
3. The school district prominently posts that students may be audiotaped on each school bus or school vehicle where such audio recording occurs.

School districts that use video surveillance cameras on their school buses and school vehicles, that have audio recording capabilities, should take immediate steps to ensure their compliance with the aforementioned requirements. School districts should contact their Solicitor in order to review their current policies and to make any necessary modifications in order to ensure that they are in full compliance with Act 9's new requirements.

Fact-Finding in Executive Sessions Now Legal

On December 16, 2013, the Pennsylvania Supreme Court confirmed, in the case of *Smith v. Township of Richmond*, that prior to decision making, school board directors and other elected officials may hold private information gathering sessions without running afoul of Pennsylvania's Sunshine Act, *65 Pa. C.S.A. §§ 701-706*.

The legal issue in *Smith v. Township of Richmond* involved whether township supervisors could meet privately with neighboring local officials, members of a citizens' group and representatives of a local company regarding litigation over the expansion of a cement quarry. The purpose of the private meeting was to ask questions and obtain information regarding the potential impact of the quarry. The Township Supervisors subsequently approved at a public meeting a settlement agreement with the cement company, and a local resident sued the Township arguing that the earlier private fact-finding sessions violated the Sunshine Act.

The Supreme Court concluded that a meeting occurs, and must be open to the public under the Sunshine Act, whenever a quorum of the governing body of the agency assembles to deliberate agency business. The law defines deliberation as a discussion of agency business for the purpose of making a decision. The Supreme Court has made past decisions which allow for executive session discussion on pre-decisional material, but it was not until the case of *Smith* that the Supreme Court granted the public entities such leeway in fact-finding discussion meetings. The Supreme Court explained that such decision-making discussion implies either a debate or discourse directed toward the exercise of judgment to decide between multiple options.

The Supreme Court ultimately concluded that the fact-gathering sessions did not constitute deliberations under the Sunshine Act because the purpose was information gathering. Gatherings held solely for the purpose of collecting information or educating agency members about an issue do not fit within the Sunshine Act deliberation description, notwithstanding that the information may later assist the members in taking official action on the issue. To conclude that such information-gathering discussions are held for the purpose of making a decision would amount to a strained interpretation not reflective of the legislative intent.

In the case of *Smith v. Township of Richmond*, the Supreme Court declined to adopt a bright-line rule to determine when private fact-gathering sessions might cross over into deliberations. In fact, the Court stated that any determination whether sessions should take place in public settings will depend upon the specific facts in any particular case. Districts, boroughs and townships must remain cognizant of the difference between fact-gathering executive sessions and deliberations behind closed doors which will amount to a Sunshine Law violation. If there is any issue into whether a discussion and/or deliberation is being had, or a fact-gathering session, Boards should contact their Solicitor in order to ensure there will not be a violation of the Sunshine Act.

California District Threatened With Suit for Refusing to Allow Elementary Student to Distribute Candy Canes with Religious Message

Advocates for Faith and Freedom (AFF) has threatened a California School District with a First Amendment lawsuit over the school's refusal to allow an elementary student to distribute candy canes containing a religious message to classmates. The student allegedly went to distribute candy canes containing the so-called legend wherein the story claims candy canes were invented to represent the life and ministry of Jesus Christ. The District has taken the position that the teacher, nor any other District employee, had any intention other than to maintain an appropriate degree of religious neutrality in the classroom and to communicate this to the child in an age-appropriate manner. AFF is demanding that the School District change its policy and issue a written apology to the student. In October 2011, the U.S. Court of Appeals for the Fifth Circuit in the case of *Morgan v. Swanson* rejected a lower court's decision denying two elementary school principals qualified immunity from a free speech suit brought by the two students prohibited from distributing the candy canes and its story. A majority of the court agreed that this area of the law was not "clearly established" at the time the principals prohibited the students from distributing these religious materials on school grounds. Irrespective of same, the Court, under the U.S. Supreme Court's decision in *Tinker*, found the students were permitted to distribute such materials in the school setting.

Guidance Counselor Fired for Publishing Relationship Advice Book

An Illinois school district terminated a guidance counselor for publishing an "adult" book on male-female relationships, entitled "It's Her Fault." Throughout the book the guidance counselor had used sexually explicit terminology. The guidance counselor was unanimously fired by the school board and he subsequently filed suit in Federal District Court against the School District claiming that he was dismissed in retaliation for exercising his First Amendment rights. The District Court dismissed his retaliation claim, holding that he was not entitled to First Amendment protection because his book did not address a matter of public concern.

On appeal to the U.S. Court of Appeals for the Seventh Circuit, a three judge panel ruled that the School District did not violate the school guidance counselor's First Amendment free speech rights. Interestingly the Seventh Circuit Panel held the District Court erred in finding Craig's speech, i.e., "It's Her Fault," did not relate to a matter of public concern. The Court then went on to summarize the standard for determining a matter of public concern. The Court noted that while certain parts of the book dealing with sexual exploits were not a matter of public concern; the other part of the book addressing adult relationship dynamics, a subject that interests a significant segment of the public, is sufficient to establish a prima facie First Amendment protection.

In applying a balancing test under two U.S. Supreme Court decisions commonly referred to as the *Connick/Pickering* balance test, the Court ruled that the School District's interest in terminating the guidance counselor outweighed his First Amendment interests. Ultimately the Court sided with the School District that his book

created an intimidating educational environment at the School District. The Court accepted the District's assessment of how his students, and particularly his female students, would respond upon reading or hearing about the hypersexualized content of his book. The Court commented that the guidance counselor works closely with students at a public school as a counselor which confers upon him an inordinate amount of trust and authority. As a guidance counselor, he needs to maintain a safe place for his students in order to ensure they remain willing to come to him for advice. If he fails to create the appropriate environment for his students, they will not approach him and he cannot do his job. Ultimately, the Court held that the school district reasonably concluded that some of these students, knowing his views on it, would decline to ask for his help.

The takeaway from this case is that when faced with these types of fact patterns, school districts need to consult with their solicitors before proceeding against an employee to ensure that all the legal i's and t's are dotted and crossed to avoid a claim of potential liability against the school district.

Free Speech *Continued from page 3*

K.A. maintained that she wanted to hand out the invitations to share her religious faith with her classmates. While students at the Elementary Center were normally allowed to pass out invitations to birthday parties, Halloween parties, Valentine's dances, and the like during non-instructional time, K.A.'s teacher informed K.A. that the principal would have to approve the flyer before she could distribute it. After K.A. submitted the invitation for review, K.A.'s father e-mailed the Principal to see if the flyer had been approved. The Principal informed K.A.'s father that non-school related flyers had to be approved by the superintendent, and the superintendent had not approved K.A.'s invitation. When the father asked for a written explanation of the denial, the Principal referred him to District Policy 913. When he sought more clarification, the Superintendent informed him that Policy 913 provided the Superintendent with the authority to prohibit the distribution of such a flyer.

In most cases district solicitors provided analysis on changes that potentially needed to be made as it related to District Policies for Non-School Organizations, Groups and Individuals and the Policies as they relate to Student Expression and Distribution and Posting of Materials. In most cases these District Policies were identified as Policy 913 and Policy 220 respectively. The take-away from the *Pocono Mountain School District* case is that school district policies permitting dissemination to or by students or staff members of *only* literature and materials directly related to school district activities or that contribute significantly to district instructional programs were unconstitutional as applied. Furthermore, such policies were found to be broader than what was allowed under the *Tinker* analysis, under which student expression could be regulated only if it causes disruption or interferes with rights of others or if it falls into one of narrow exceptions to that rule. *(Pocono Mnts.)*.

First Amendment claims are generally examined through the lens of forum analysis, under which the Government's interest in limiting the use of its property to its intended purpose is weighed against "the interest of those wishing to use the property for other purposes." Under forum analysis, regulations of speech in public forums such as sidewalks and parks are "subject to the highest scrutiny" and survive only if they are narrowly drawn to achieve a compelling state interest, while identical regulations in nonpublic forums such as prisons and public schools "must survive only a much more limited review," and "need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view."

Whereas students do not wholly shed their constitutional rights to freedom of speech or expression at the schoolhouse gate, administrators also have the right to protect the general population from substantial disruptions and harm that may come to such students. While in school, a student generally may express his or her opinions, even on controversial subjects, but he/she must do so without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others. For this reason, school districts should be contacting legal counsel in order to evaluate freedom of speech issues on a case-by-case basis under the new *Pocono Mountain* analysis.

Andrews and Beard Education Law Focus

As solicitors, labor counsel and special counsel, Andrews and Beard 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.

Our legal expertise includes: Solicitorship Services, Collective Bargaining – Teacher and Support Contracts, Employment Matters, Labor Arbitrations, Special Education Issues and Proceedings, Defense of Tax Assessment Appeals, PHRC/EEOC Complaints, Student Expulsion Hearings and Constitutional Issues.

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 ljw@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:

David Andrews: *dandrews@andrewsbeard.com*
Carl P. Beard: *cbeard@andrewsbeard.com*
Elizabeth Benjamin: *ebenjamin@andrewsbeard.com*
Ronald N. Repak: *rrepak@andrewsbeard.com*
Brendan J. Moran: *bmoran@andrewsbeard.com*

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ANDREWS & BEARD
LAW OFFICES

MAIN OFFICE:
3366 Lynnwood Drive P.O. Box 1311
Altoona, PA 16603-1311
814/943-3304 FAX: 814/943-3430
www.andrewsbeard.com