

President Biden Signs Executive Orders Giving Transgender Student Athletes Right to Participate on a Sports Team with the Gender They Identify

On January 20, 2021, President Joe Biden signed an executive order which states, “Children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports.” This order provides hope for young transgender athletes seeking to participate as their identified gender in high school and college sports. However, the order was vague and set no specific guidelines governing the actual participation of transgender athletes – it only calls for agencies to review their policies, and within 100 days from January 20, come up with a plan to ensure transgender youth do not face discrimination in any aspect of their educational experience.

Critically, this order also states the U.S. Supreme Court decision of *Bostock v. Clayton County*, which expanded the definition of sex discrimination to include discrimination based on sexual orientation as well as gender identity, should be extended from Title VII to Title IX, the federal law that prohibits discrimination in federally funded schools.

Ultimately, as there are no set guidelines, this order could be open to interpretation and may lead to new legal challenges of laws and policies concerning transgender athletes.

Stay tuned, additional information will be forthcoming

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New Training Module for Title IX Investigators

Levin Legal Group and Beard Legal Group have collaborated on a new targeted training module for the Title IX Investigator. Details will be forthcoming.

Judge Upholds Student Expulsion for Harassment and School Disruption

Appeal of *G.S., a minor, by and through his parents, Erin and Jason Snyder*, Civ. No. 2019-006041 (Delaware Co. Ct. of Comm. Pleas 2020)

A Rose Tree Media School District student, G.S., was expelled for what he thought to be an innocent post on social media. G.S.'s expulsion came after he posted vulgar lyrics on Snapchat from a song entitled "Snap" by the band Spite. The post read, "Everyone, I despise everyone! F*** you, eat s***, blackout, the world is a graveyard! All of you, I will f***ing kill off all of you! This is me, this is my snap!" It was the last line of the post that drew the most attention.

When the high school's social media account was tagged by someone who reposted the snap, it was identified as a threat. The same evening the post was created, the Pennsylvania State Police spoke with G.S. and his parents at police barracks. G.S. was charged with terroristic threats and was subsequently taken into and eventually sent to a juvenile detention center.

Word of the threat spread through the school community and the next day only approximately 75% of the school population came to school. Pennsylvania State Police troopers were also present in the hallways and common areas of the school the week following the post.

Ultimately, G.S. was suspended for 10 days for the offenses of terroristic threats and a significant disruption of the school environment. However, upon recommendation of the superintendent, G.S. was eventually expelled for the reasons set forth for his suspension as well as a new offense of harassment.

G.S. appealed his expulsion to the Court of Common Pleas of Delaware County, Pennsylvania. Here, the judge reviewed the expulsion but limited the scope of the inquiry to a determination of "whether the School Board's adjudication violated constitutional rights or is not in accordance with the law, or if any necessary findings of fact support

the adjudication is not supported by substantial evidence."

First turning to the offense of terroristic threats, the judge found no definition of this offense was included in the Rose Tree Media Student Discipline Code. Therefore, the judge turned to the definition of terroristic threats as defined in the Pennsylvania Crimes Code. Using the definition as a guide, the judge found that G.S. did not intend to terrorize anyone or that he acted with a disregard of the risk of causing such terror. The judge came to this conclusion by reasoning G.S.'s Snapchat was set to private and the actual post was a verbatim quote from a song, not G.S.'s actual words.

Next, the judge turned to the offenses of harassment and disruption of the school environment. Here, the judge found that there was substantial evidence to support these charges because the record showed that G.S.'s conduct was perceived as intimidating and threatening by others resulting in a disruption of the educational environment.

Although the Judge upheld the District's adjudication expelling the student for harassment and engaging in conduct/speech that disrupted the school environment, the Judge did not uphold the District's administrative charge of "Terroristic Threats" under the Student Code of Conduct.

Practice Note: While the case resulted in a good outcome for the District, the Judge's ruling reinforces a school district's need to be cautious when charging students with administrative charges of "Terroristic Threats" under its Student Discipline Code or School District Policy regarding same.

In this case, the District's Student Discipline Code did **not** contain a definition of "Terroristic Threats." School Administrators need to be cautious when drafting administrative charges relating to Terroristic Threats. For a detailed analysis of other Pennsylvania Common Pleas and Commonwealth Court decisions outlining the technical issues of a "true threat" analysis when terroristic threat charges and free speech issues collide, see articles on *J.S. v. Manheim Township School District* and *Commonwealth v. Knox* in Beard Legal Group Education Law Report Volume XV, Number 2 (May 2019) and Volume XVI (June 2020).

Judge Holds District Can Exclude Student Athletes from Participation for After School/Off-Campus Conduct

On September 8, 2020, seventeen year old T.W. was suspended for one year for his third violation of the District's drug and alcohol policy for students – which does not require students to use drugs or alcohol, but merely be present while such use is occurring.

By way of background, T.W. had been arrested on November 8, 2019 for drunk driving which resulted in his first violation of the school's policy. During his second violation on February 15, 2020 T.W. was present at an off-campus gathering where drinking was happening. Finally, T.W. attended a party on September 5, 2020 to which police responded. Though T.W. was not drinking on September 5, he was cited.

Displeased with the district's decision to suspend their son, T.W.'s parents filed a claim in federal court on September 17, 2020 asserting that the School District's policy is invalid on its face and as applied. They also raised equal protection, substantive due process, and procedural due process challenges to his suspension. Ultimately, T.W.'s parents were seeking injunctive relief to prevent the District from enforcing the applicable section of the Code of Conduct, thereby lifting T.W.'s suspension and allowing him to play sports this year.

On November 30, 2020, a judge from the U.S. District Court for the Middle District of Pennsylvania affirmed the suspension of the 17-year-old high school football player. In coming to this conclusion, the judge focused on a four factor analysis and balancing test. "A party seeking a temporary restraining order must establish four (4) factors: '(1) a likelihood of success on the merits, (2) the probability of irreparable harm if the relief is not

granted, (3) that granting the injunctive relief will not result in even greater harm to the other party, and (4) that granting relief will be in the public interest.'" A court will then balance these factors to determine whether injunctive relief is warranted.

Ultimately, the court did find that the student would suffer irreparable harm by being excluded from all athletic competitions. However, the court concluded that there would be greater harm if the court granted the preliminary injunction and the school district was unable to enforce its policies.

"Being unable to participate in athletics for a year is a 'temporally isolated opportunity' and is, the Court agrees, precisely the type of injury that preliminary injunctive relief is intended to prevent." However, "the Court is satisfied that the risk of harm from enjoining the District's ability to consistently enforce its disciplinary rules sufficiently outweighs the risk that [the student] faces as a result of suspension."

Practice Note: Each year schools are encouraged to revise and update the Student and Athletic Handbooks to ensure the language contained therein is current and consistent with school district policy.

Federal Judge Reduces Parent's Attorney's Fees

The case of *E.H. v. Wissabickon Sch. Dist.* concerned the proper amount of attorney's fees and expenses to be awarded. Here, the school district argued that the parents of four separate students with disabilities did not prevail on every issue at the administrative level and that the parent attorney's fee award of \$548,388 should be significantly reduced by at least fifty percent (50%).

The judge noted that a court may reduce a fee award based on a parent's failure to achieve total success on the claims asserted. In coming to its conclusion, the court looked to the attorney's hourly rate and hours billed and the parent's victory in each case.

(Continued on next page)

DOL Issues New Rule for Independent Contractors

On January 6, 2021, the Department of Labor released its eagerly anticipated final rule that clarified employee versus independent contractor status under the Fair Labor Standards Act (FLSA). This rule is likely to have an impact on labor relations, pay scales, and benefits for workers.

Under this final rule, employers are allowed to use what is known as the “economic reality” test which uses two core factors and three “guideposts” to determine an employee’s status. The two core factors consider (1) the nature and degree of the worker’s control over the work and (2) the worker’s opportunity for profit or loss. If these two factors conflict with one another, employers should then look to the three “guideposts” factors, which weigh: (3) the amount of skill required for the work; (4) the degree of permanence in the working relationship; and (5) whether the work is part of an integrated unit of production. The Department of Labor considers the two core factors more important in the analysis.

Department of Labor Wage and Hour Division administrator Cheryl Stanton in a statement said that “streamlining and clarifying the test to identify independent contractors will reduce worker misclassification, reduce litigation, increase efficiency, and increase job satisfaction and flexibility.” However, this rule may face serious legal challenges as it has been opposed by many labor unions. Some officials in the incoming Biden administration have also expressed their opposition. Therefore, this rule could be nullified or rolled back before it takes effect on March 8, 2021.

For now, however, employers should become familiar with the economic reality test as finalized by the DOL. Employers should use this time before the rule goes into effect (or is withdrawn) to review existing policies and ensure that any changes with respect to worker-relationship is taken care of immediately before this rule goes into effect.

<https://www.dol.gov/agencies/whd/flsa/2021-independent-contractor>

Federal Judge Reduces Parent’s Attorney’s Fees

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As to the first two students, the court disagreed with the district that the award should be halved noting that the parents prevailed on nearly all the core issues – that the evaluations were insufficient, the IEPs were inappropriate, and the district failed to consider the least restrictive environment (LRE). The court did concede that the hearing officer failed to award compensatory education although the student’s IEP did not offer them FAPE. Here, the court agreed a small reduction in parent’s attorney’s fees was appropriate, not a 50% reduction.

As to the third student, the court reasoned that although the parent did prevail on significant issues, the hearing officer found the student’s evaluation to be appropriate. Thus, only a 20% reduction was merited. The fee award for the fourth student was also reduced 20% since the attorney litigated some issues the parents had already waived.

Overall, the district will still have to pay \$414,388 in attorney’s fees and expenses, but this number is significantly less (\$134,000) than the original amount.

Practice Note: Schools need to be ever vigilant to apply a “cost-benefit” analysis when litigating special education issues. In some cases, the attorney fees of the parent’s council can far exceed the requested relief.

School Athletics and COVID-19

CDC scientists recently published a viewpoint article (not official CDC opinion) about schools reopening, including the increased risk from athletic practices and competitions. They specifically called out high school wrestling tournaments in Florida that created outbreaks of COVID-19.

https://jamanetwork.com/journals/jama/fullarticle/2775875?guestAccessKey=9961f22d-99e6-4861-8fa6-cf0b3463ef92&utm_source=ForTheMedia&utm_medium=referral&utm_campaign=ftm_links&utm_content=tfl&utm_term=012621

The CDC report on the Florida wrestling competitions concluded that high-contact school athletic activities for which mask wearing and physical distancing are not possible should be postponed during periods with substantial or high levels of COVID-19 community transmission.

(<https://www.cdc.gov/mmwr/volumes/70/wr/mm7004e4.htm>)

U.S. Supreme Court to Hear Student Free Speech Case

On January 8, 2021, the U.S. Supreme Court granted Mahanoy Area School District's Petition for Writ of Certiorari to hear the appeal from the U.S. Third Circuit Court of Appeals decision issued on June 30, 2020 upholding the student's First Amendment Free Speech rights. Mahanoy Area School District is asking the Supreme Court to decide the appropriate legal standard to be applied to disruptive and offensive speech that originates off campus during non-school hours, but is directly and

intentionally aimed at the school community.

As you will recall in *B.L. v. Mahanoy School District*, Student B.L. was dismissed from the cheerleading squad following posting a "snap" of her and her friend holding up their middle fingers with profane text written over the top of the photograph. Both the Federal Middle District and Third Circuit Courts ruled the School could not punish B.L. for profane out-of-school speech.

Beard Legal Group has extensively reported on the prior Federal Middle District Court of Pennsylvania decision, as well as the Third Circuit Court of Appeals Decision (see Education Law Report, Volume XIII Number 4 of July 2018 and Education Law Report, Volume XVI Number 3 of July 2020).

Both the Pennsylvania School Board Association (PSBA) and the National School Board Association (NSBA) have filed amicus briefs in support of Mahanoy Area School District's Petition.

Commentary: This case will clearly determine the standard by which off-campus, after-school hours speech can be addressed by School Administration.

Recent Presentations

Attorney Beard presented at the Education Law Virtual Conference hosted by the Pennsylvania School Study Council on November 10, 2020 with a "Special Education Update"

Attorney Benjamin and Attorney Repak jointly presented at the Education Law Virtual Conference hosted by the Pennsylvania School Study Council on November 11, 2020 on the topic of "COVID-19: Labor Relations While We Weather This Storm"

Attorney Beard co-presented at the Federal Bar Association Civil Rights Étouffée on January 29, 2021 on the topic of "Making it Right: Vulnerable Kids, Education, and COVID-19"

Beard Legal Group Education Law Report

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 carriers.

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. Peggy Schooling mxs284@psu.edu.

Subsequent Issues

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