

PA SUPREME COURT NOTES EXCEPTION TO IMMUNITY DOCTRINE

The Supreme Court of Pennsylvania recently issued a decision which will dramatically impact school districts concerning qualified immunity and liability. The Political Subdivision Tort Claims Act (“PSTCA”) 42 Pa.C.S. § 8541 grants governmental

immunity from tort liability to local political subdivisions, including public schools. Essentially the PSTCA provides for governmental immunity against damages due to injury to a person or property caused by acts of a local agency, except for a few narrow exceptions under the Act, one of which is injury caused by real property under the care, custody, or control and in the possession of the local agency, except that the local agency shall not be liable for damages on account of any injury sustained by a person intentionally trespassing on real property in the possession of the local agency.

In the lower court, as outlined in the case of *Brewington v. School District of Philadelphia*, 2018 WL 6815459 (PA 2018), the specific issue argued was the real property exception to governmental immunity and, in particular, whether the absence of padding on a gym wall which a student ran into during gym class and causing severe injury, falls within the exception. The injury was caused when during gym class the teacher asked the students to run from one side of the gym to the other side. As the students were running, the student tripped and landed face first into the concrete wall, which was on the far end of the gym. The complaint alleged that the student’s injuries were caused by a “defective and dangerous condition of the premises caused directly by the actions/inactions of the school district (i.e. gym without safety mats).” The court discussed case law concerning the real property exception to governmental immunity under the Act and explained that courts have repeatedly

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US District Court in New York Tackles Service Animal Complaint

In *Doe v. US Secretary of Transportation, et al v. School (2018)* the parents of a middle schooler with asthma and severe allergies filed suit claiming Kotonah-Lewisboro District did not properly handle and/or implement their daughter's Section 504 Plan when it allowed a service animal into the school setting and/or come too close to their daughter. According to the parents, there were four instances over the course of a year where their daughter either had been in a room that had been previously occupied by a service animal, or the service animal came too close in proximity to their daughter. According to the parents, their daughter had allergic reactions to animal dander as a result of the service dog's presence in or on school property.

According to the facts, the female student has chronic asthma and food and environmental allergies including an allergy to dogs. The student suffers allergy symptoms and her asthma is triggered when she comes in contact with dogs, dog dander, and protein emitted by a dog. Her symptoms upon contact with a dog include "asthma attacks, difficulty breathing, wheezing, hives, rashes, excessively running and/or a clogged nose, watery eyes, coughing, sneezing, nose bleeds, difficulty in concentrating, difficulty performing the functions of daily living, and difficulty interacting with others, among other symptoms." According to the record, dog dander and proteins emitted by a dog may remain in indoor space after the dog is removed, and they do not necessarily lose their toxicity toward people with allergies and asthma over time.

When the student first entered middle school in the 6th grade, the parents noticed that they had to administer more medication to their daughter than usual. The initial request to the District was to ask the school to exclude dogs from school property but the school had responded it was bound by federal and

state laws that required it to allow service animals/ service dogs at school.

In November 2014, despite objections from the female student's parents, the school district invited a parent who uses a service dog, (CEO of an organization that trains and promotes the use of service animals) to come to the school and give a lecture to the 6th grade students. The student subsequently suffered asthma and allergy symptoms although it is unclear whether she actually attended the presentation.

Two months later, in January 2015, the District identified the student as having a disability pursuant to Section 504 and developed a 504 Accommodation Plan for the student. The 504 Plan required the District to prevent contact between the student and service dogs, employ a cleaning protocol anywhere a service dog had been, and notify parents of known or expected visits to school by a service dog. Approximately one month later, the student was required, as part of the orchestra to perform a concert. The same parent who had come into the school and done a presentation, attended the concert and brought their service animal with them. It is unclear how close the dog came to the student but she suffered asthma and allergy symptoms.

Subsequently, in May, the school district held a fundraiser for a service dog organization and the same dog was brought to the fundraiser. In the facts of the case, the District notified the parents of the female student one week before the dog was to come into the school to attend the fundraiser. Approximately two weeks after that, the female student, was part of another orchestra concert. Pursuant to the 504 Plan, the student was seated in another corner of the auditorium, close to the basement exit and was escorted out of the auditorium immediately after the concert. According to the parent, the student was not allowed to mingle in the lobby after the concert. During this same period of time, the student selected works during music class for the following year but the parents withdrew their daughter from that class because of concerns that the District failed to adequately protect their daughter.

Ultimately after several other incidents with the service dog in December 2016, the district

instituted a new 504 Plan that required, among other things, that any service dog within 30 feet of the student had to be moved. After this, the parents allege that the District did not comply with the revised Plan on two occasions. The first was in June 2017 at middle school graduation where the student came upon a service dog outside the school in an area where students were gathered to take pictures and congratulate each other. The second occurred in January 2018 when the student had to perform at a concert and she was seated at the front of the stage for the first half of the show within 30 feet of a service animal.

The parents brought action not only against the school district but the state and federal government as it relates to the laws that they claim are not adequately protecting their daughter. In defending the case, the school district maintained that its Section 504 plan afforded the student reasonable accommodation under the ADA and the Rehabilitation Act. The school district outlined it was simply not free to ban all dogs from the school and the student was not in any event entitled to “a perfect accommodation or the very accommodation most strongly preferred by” her.

In addition, the District argued that all of its plans adhere to Civil Rights with the Division’s guidance on complying with the ADA:

Allergies and fear of dogs are not valid reasons for denying access or refusing service to people using service dogs. When a person who is allergic to dog dander and a person who uses a service animal must spend time in the same room or facility, for example, in a school classroom . . . , they both should be accommodated by assigning them, if possible, to different locations within the room or different rooms in the facility.

U.S. Dep’t of Justice, Civil Rights Div., ADA Requirements: Service Animals (July 12, 2011), https://www.ada.gov/service_animals_2010.htm.

After weighing everything, the District Court Judge noted that the parents’ allegations, though sparse, were sufficient to support a claim that the District failed to accommodate their daughter’s disabilities as the parents alleged and it was derived that the District’s failure would amount to disability discrimination. In the end, the Judge commented

while public entities are not required to enact perfect accommodations for people with disabilities, the accommodations still must be effective.

This case reinforces the fact that case law is clearly established that districts cannot prevent service animals from coming into schools provided that there is a reasonable basis to do so. What is the important takeaway in this case is the fact that if a student does have a severe allergy to a dog and/or dog dander, districts need to ensure that whatever accommodation is worked out with the parents that it is properly implemented.

Exception to Immunity Doctrine

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held that allegations of a governmental agency’s negligence in the care, custody, and control of real property that rendered the property unsafe for its intended and foreseeable use fall within the real property exception to governmental immunity.

The court’s opinion and ultimate decision in this case is quite lengthy, however, the legal theory can be summarized very briefly. The court held that pursuant to the plain language of the Act, a claim that a local agency failed to pad a gym wall constitutes an assertion of an act of negligence by a local agency concerning the care, custody and control of real property, and thus, falls under the real property exception to governmental immunity.

For this reason, school districts should undertake an assessment of their gyms, or other similar arenas to ascertain whether or not pads being placed on the concrete walls would add a level of security and reduce or eliminate the potential of liability. In this case, the Court found the student’s injury during gym class was reasonably foreseeable.

As such, School Districts are recommended to undertake proactive measures and/or conduct a safety assessment, and follow through with adding appropriate padding to concrete walls as necessary and/or appropriate.

Principal's Actions Almost Expose District to Liability

A Nebraska School District principal's actions almost exposed the school district to liability. In this particular case, the parent of students in the District had enrolled in a college level public speaking course that would be televised at the local high school. After a couple of class periods, the parent requested to attend the class at Sargent High School because it was much closer to her home and that request was approved by the District's High School Guidance Counselor.

The parent alleges that when she went to the high school to view the public speaking class, the High School Principal raised his voice and yelled at her to get out while in the hallway near the office and told the lady that her service animal could not accompany her to the course.

According to the complainant's husband, he called the District and spoke to the Principal and Superintendent and it is alleged that they told him because they were allowing the parent to view the class at the school they did not have to allow her to have her service animal with her. According to the husband's comments to the Office of Civil Rights Compliance, his children attend school in the District and his wife has taken the service animal to the District previously and has never been denied access to the school buildings.

According to the information available, the mother had a service dog which assisted her getting out of her chair, reminds her to take her medicine, and assists her with traveling stairs. According to the District, they contended that because the college course was televised to multiple locations and the parent chose to attend the course at the high school, it was not required to admit her service dog onto the school grounds.

The concern of both the parent and the Office of Civil Rights Compliance was that the District's actions violated Section 504 and Title II of the ADA.

Before the matter could fully develop, the

District agreed to enter into a Resolution Agreement with the Office of Civil Rights Compliance and the District committed to adhering to the requirements of Section 504 of the Rehabilitation Act of 1973 as well as Title II of the Americans with Disabilities Act of 1990.

The takeaway from this case is that before districts contemplate banning service animals from their properties they need to ensure that they are on solid legal ground. In this case, the principal's actions could have exposed the District to a Section 504 and/or Title II ADA violation. Fortunately, the District recognized its short comings and entered into a Resolution Agreement with the Office of Civil Rights to resolve the matter.

Whenever districts are faced with a situation involving a service animal and they are unclear as to what is or is not permitted under the law, they should consult with their Solicitor or Special Counsel.

U.S. Department of Education Releases New FERPA Guidance

Some time ago the U.S. Department of Education established the Privacy Technical Assistance Center (PTAC). It was intended as a one-stop "resource for education stakeholders to learn about data privacy, confidentiality, and security practices related to student data systems and student data." The establishment of the PTAC was to provide critical information to schools on a number of timely topics and how school officials can balance the interests of safety and privacy for students.

While the Family Educational Rights and Privacy Act (FERPA) generally requires written parent consent before an educational agency discloses student education records and Personally Identifiable Information (PII), FERPA gives schools and districts flexibility to disclose PII under certain limited circumstances in order to maintain school safety.

The new Guidance from the U.S. Department

of Education provides a good resource and discussion regarding health or safety emergencies often faced by public elementary and secondary schools. To assist schools USDE (PTAC) put together a comprehensive guidance containing 37 frequently asked questions (FAQ) attempting to explain and/or clarify “how FERPA protects student privacy while ensuring the health and safety of students and others in the school community.” The FAQ can be viewed and/or downloaded from <https://studentprivacy.ed.gov> More PTAC information is available at PrivacyTA@ed.gov.

Please keep in mind in Pennsylvania the Chapter 10 Regulations (22 Pa.Code 10.1, et seq.) per the SafeSchools Act (PSC 1301-A to 1313-A) outlines requirements for reporting certain offenses occurring in the school setting to law enforcement (through the Model Memorandum of Understanding between Law Enforcement and the School Entity). This Memorandum outlines the procedures school districts must follow when releasing student records to law enforcement pursuant to FERPA.

If you would like a copy of our outline with a synopsis of information presented at the Student Safety Symposium, sponsored by GAGGLE in September 2018, regarding Chapter 10 requirements and the Model Memorandum of Law Enforcement, please contact our office.

Beard Legal Group, P.C. Welcomes Newest Member

The firm welcomes its newest member, Attorney Krystal T. Edwards.

Prior to law school at Duquesne School of Law and passing the Pennsylvania Bar, Attorney Edwards was a classroom substitute teacher for one (1) year and served in other capacities within the public school system and post secondary senior high.

Attorney Edwards’ time spent teaching along with her Master’s Degree in Educational Leadership, Policy and Development is an excellent fit in our school law practice.

Court Upholds Student’s Removal For Assaulting Classmate

JH v. Rosetree Media School District, (E.D.Pa.2018)

In this particular case, the US District Court, Eastern District of Pennsylvania, upheld an administrative decision that a student’s misconduct (arranging for a friend to film him assaulting a school mate in the school cafeteria) was not a manifestation of his disability. What weighed heavily against the conduct being a manifestation of the student’s disability is, by making an arrangement with other students to video tape it can suggest to the trier of fact that since other students had notice of the conduct in advance, this really did not directly lend itself to the claim that his actions were linked to his disability of impulsivity. While the student clearly had issues surrounding impulsivity and a low tolerance for frustration, many of his friends were able to record the six second assault. This helped demonstrate that the student planned the attack against the fellow student and was not directly related to his disability.

The Eastern District federal court in Pennsylvania granted the District’s motion for judgment on the Administrative record wherein a Due Process Hearing Officer found the District properly conducted a manifestation determination prior to expelling the student from school. The student had an IEP and identified with a specific learning disability and ADHD. JH planned, with a friend, that he would assault another student while the friend videotaped it. JH went up to the planned victim, pretended he was going to engage him in conversation and without provocation, slammed the victim’s face into his food and when the victim turned to defend himself, JH punched him causing severe injury.

The Court discussed the manifestation determination review (MDR) process. Interestingly, the Court stated that those who carry out the process must review all relevant information, but need not

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Don't Take The Bait

In the case of *Vilonia School District* the Student had a diagnosis of Other Health Impaired (ADHD and ODD). Student posted a selfie on social media with him holding a gun with a hash tag reading “I love it when they run.” On that same social media site, the student recorded himself saying, “I fight to kill” and “I will send straight bullet.” The Principal did not discover this himself but rather had the photo of the student forwarded by the parent of another classmate of the student. Before talking to the student or contacting the parents, the Principal forwarded the photo to local police. When the student was confronted by the Principal, he reported the gun did not shoot real bullets and he was not serious about the threat. The Arkansas School District subsequently scheduled a manifestation determination review (MDR) at the police station. In the meantime, the District suspended the student for the post and recommended expulsion. When the MDR did not take place, the parents filed for due process. After hearing all of the testimony, the Hearing Officer stated the District’s actions reflected “either a disregard for or an ignorance of the impact of the student’s traumatic brain injury and ADHD.”

Interestingly, the District introduced evidence in the form of a note dated 3/6/2018 written by a college intern of an event that took place during the weeks earlier where the student reportedly told the intern he wanted to fight someone, kill them, and then go to prison for the rest of his life. The following day the intern recorded in her notes that “he said he was doing better” and that “he finished up with his work and I did not have to pull him out of the advisory anymore.” There was no discussion following the event with the Principal or any other administrator that would have addressed the student’s state of mind, depression or thoughts of killing someone.

The Hearing Officer, as part of his facts found as follows: The student posted a self-photo on a social media platform along with the lyrics from a rap song which read “I love it when they run.” The Hearing Officer noted this incident was not posted while the

student was in school nor on school property. The photo and information was not addressed to any one person or audience.

The Hearing Officer looked at the Behavior Improvement Plan and looked at the testimony. The only testimony as it relates to this student’s behavior regarded being “upset, throwing a chair and hitting the Smart board, and another time when he punched a door and punched the glass out of it and hurt himself.” The Hearing Officer noted the Behavioral Improvement Plan (BIP) does not contain any behaviors related to the issue of dangerousness to self or others.

Interestingly, in the hearing testimony was developed that the student had a positive working relationship with District staff. Although he may have shared some of his difficulties, no support services were put in place to assist him with self-harm thoughts.

Hearing Officer also noted that none of the testimony demonstrated any attempts by the student to threaten or harm another student on school grounds.

According to the Hearing Officer the District also chose to ignore a statement from the student’s treating physician that, in his professional opinion, the student did not pose a threat to himself or others and instead elected to suspend and recommend expulsion.

In the end, the Hearing Officer determined that the parent had introduced sufficient evidence to reflect the District failed to develop and implement an appropriate IEP to address both the educational and behavioral issues presented to them by the student. The District was also required to have a representative from the Department’s Brain Injury Specialist to be involved in development of an IEP.

Moral of the story: It is imperative to Stop, Think and Consult.

This case offers a great example to school districts that each case they encounter is going to be fact specific. In this case, the District ignored numerous signs and failed to take the opportunity to assist the child in development of his educational program.

While there is no dispute that the safety and welfare of not only this student, but others, is of utmost importance to schools, at the same time the law is very clear based on the original holdings in *Honig v. Doe*, 484 US 305 (1988), that schools no longer have the ability to unilaterally remove kids from school. The *Honig* court refused to accept the school district's request that the court read "a dangerous exception into the IDEA."

While there is flexibility provided to schools, they need to do their homework and properly prepare their cases to demonstrate how the student does pose a threat, i.e. being dangerous, so as to provide the necessary information to support that the student needs to be excluded beyond a ten consecutive day period of time.

Are You a Trout? Consider this case:

In *W. et al v. The Ellis School 2:17-CV-1189 (W.D. Pa. 2018)* the parent had emailed a school director about their daughter's disability related needs. Shortly thereafter the father sent an email raising concerns about disorganization and harassment. The private school discontinued the enrollment of the student in the school. At this point, the Court refused to grant the Motion to Dismiss filed by the school finding the parent had stated a viable claim for relief.

The lesson to be learned in these types of cases is that before any administrator would take any type of action against a student that might be related to a protected activity or a parent advocating on behalf of their child, they need to be mindful that they could find themselves defending a lawsuit for retaliation.

Once again, before any action is ever taken in regard to a parent's email advocating on behalf of their child, the matter should be discussed with the Superintendent and if necessary the Solicitor or Special Counsel to attempt to avoid any possible claim due to advocacy under Section 504, ADA or IDEA.

Student Removed for Assaulting Classmate

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each review the entire file. Ultimately the Court concluded that those participating in the process considered the student's disabilities and how they manifest themselves in the student and they properly found that none of the evidence connected the student's disability to his planning of an unprovoked assault on another student.

The key for all school districts is to get to the manifestation determination review (MDR) meeting and flush out all of the facts extensively to arrive at the ultimate question as to whether the student's actions were or were not a manifestation of his/her disability.

Presentations

September 25, 2018: Pennsylvania School Study Council, Education Law Day

Carl P. Beard on Special Education.

Elizabeth A. Benjamin presented on School Safety and Security. Ronald N. Repak presented on Boosting Security: SRO or School Police Officer, to arm or not to arm.

September 19 and 20, 2018: School Safety Symposium in Cooperation with Gaggle

Carl P. Beard presented in Pittsburgh on September 26th and in Clarion on September 27th.

October 15, 2018

Jennifer L. Dambeck presented at the Principal's Association with Legal Update.

October 17, 2018

Carl P. Beard presented with Dr. David Bateman at the PASA and PSBA School Leadership Conference in Hershey on "Top 10 Issues Board Members Need to Know About Special Ed."

March 30, 2019

Carl P. Beard will be presenting at the National School Board's Association (NSBA) on the topic of Schools in Crisis: Dealing with Dangerous & Aggressive Students.

NOTE: Copies of these presentations can be requested through Regina Fisher at rfisher@beardlegalgroup.com

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.

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 ljw11@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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