BEARD LEGAL GROUP
EDUCATION LAW REPORT
Published in Cooperation with the Pennsylvania School Study Council, Inc.

January 2022

Federal Judge Tells District - Students Must Mask Up!

On Monday, January 17, 2022, U.S. Western District Court Judge Marilyn J. Horan entered a Temporary Restraining Order reinstating the wearing of masks indoors at the North Allegheny School District while Allegheny County is in "substantial" or "high" for community transmission/spread of COVID-19.

Facts: The Acting Secretary of the Pennsylvania Department of Health entered an Order on August 31, 2021 (with an effective date of September 7, 2021) requiring the wearing of face coverings for all K-12 public schools in the Commonwealth. After public comment, the North Allegheny School District on September 22, 2021 voted to 1) rescind the Board's action of August 18, 2021, which made mask wearing optional; and 2) adopt a policy to require masks to be worn indoors even after the Department of Health order is lifted for students, staff and visitors while Allegheny County is in substantial or high community transmission/spread.

On December 8, 2021, the Board of School Directors voted (5 to 4 vote) to reverse the District's Health and Safety Plan which outlined that universal masking was required when the transmission rate of COVID-19 in Allegheny County was in the "substantial" or "high" categories. As a result of that action, masking was set to become optional on January 18, 2022.

Please keep in mind that Allegheny County, like approximately 9 other political subdivision entities within the Commonwealth have their own health departments (6 county and 4 municipal).

On January 11, 2022, John Doe and Jane Doe Plaintiffs who are students with medical conditions and/or disabilities in the District, filed a lawsuit seeking a Temporary Restraining Order to reinstate the School Board's prior September 22, 2021 Motion for universal masking so long as transmission rate of infection from COVID-19 for Allegheny County was in the "substantial" or "high" categories and prohibit the Board of School Directors from violating the American's with Disabilities Act and Section 504 of the Rehabilitation Act.

The District filed a Brief in opposition to the Complaint and request for declaratory and injunctive relief. On January 17, 2022, oral argument was set before Judge Marilyn J. Horan. After reviewing the pleadings and hearing oral argument on the matter, the Judge granted the Temporary Restraining Order outlining that she felt the Plaintiffs would prevail on the merits.

According to the Complaint and newspaper reports, the Board's decision would impact upwards of 1000 students with disabilities in the District.

After Judge Horan rendered her decision, the

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School District released to its school community a statement outlining that its original motion approved on September 22, 2021, would be reinstated requiring masks to be worn indoors while Allegheny County was in substantial or high community transmission/spread. When Allegheny County is in moderate/low transmission spread, masks will be optional.

Judge Horan ruled that the Order would remain in effect until further notice or until School Board action complying with the ADA and Section 504. Within her decision, Judge Horan stated:

> This case involves disabled plaintiffs that cannot access facilities in the District. The medical information regarding Child Doe 1 concerns a medical preclusion from participation within a building in the District where there is no masking. Given the disability of that immunocompromised student, attending a school where there is no universal masking requirement places that student in the position of having no access to the building.

In arriving at her decision, the Judge looked to not only the transmission rate but also the positivity rate over the last several months. In her decision, the Judge stated:

> On December 8, 2021, despite the fact that the community transmission rate was measured at a positivity rate of 10.2% of a total 3,277 infections for the week beginning December 5, 2021 and still within the "high" category, the Board voted to make masks optional within the District beginning January 18, 2022.

The Omicron variant is even more highly transmissible than the Delta variant. As such, the community transmission rate is currently at 3,500 infections per day and 37.1% positive rate, which is six times higher than the positivity rate on September 22, 2021, when the Board reinstated the mask mandate and established criteria for when masks shall be worn in the District based upon rates of community spread.

In her decision, the Judge also opined:

> Beyond December and in light of the proliferation of the Omicron variant, which has resulted in significantly increased numbers of infections within the population, with particular increases in infection rates for children, it is concerning that the District has not acted to reinstate the masking mandate and transmission rate categories to avoid the optional masking policies January 18, 2022 effective date.

The Board has provided no explanation for whether it took into consideration any needed accommodations for disabled students in the District when it made the decision to lift the school mask mandate.

In the end, the Judge held "[d]enying immunocompromised Plaintiffs the opportunity to access educational opportunities in the District will cause the immunocompromised Plaintiffs to suffer irreparable harm."

In response to the Defendants' arguments that wearing of masks would create a hardship, the Judge wrote:

> Students have been wearing masks in the District for the majority of the 2020, 2021 and 2022 school years to date. The mask mandate status has been attained and maintained within the District without unreasonable expenditure or difficulty. The Defendants cite no evidence in their Brief of how masks place an undue hardship upon the District. As such, the District will not experience significance hardship if the District again requires the waring of masks in school.

In the Conclusion portion of her Decision, the Judge stated:

> It gives this Court no pleasure to interfere with School Board matters, but where the Constitution and federal law are implicated, it must. As this case moves forward, the Court would encourage a pragmatic, practical, and compassionate approach by the parties that demonstrates competent deliberation.

Within the next several weeks, the parties will return to Court where a final decision will be made relative to the Complaint and Restraining Order.

Please note this decision is specific to North Allegheny School District; however, it is instructive

as to how a Court might rule if faced with the same or similar set of facts in a Temporary Restraining Order situation.

Please be aware there is a similar case pending in the Western Federal District Court involving Upper St. Clair School District. This case may or may not have a similar outcome from North Allegheny. The focus of the suit is to stop the District from implementing a mask-optional policy for teachers and students.

The Trial Court denied relief but an Emergency Injunction was gratned by the Third Circuit Court with argument to be heard later this week. Further updates will be in our next addition.

Speech at Board Meetings

On November 17, 2021, the United States District Court for the Eastern District of Pennsylvania issued a preliminary injunction in the free speech lawsuit filed by residents of the Pennsbury School District. The residents complained that Board Policy 903, Public Participation in Board Meetings, and Policy 922, Civility, violate their right to free speech. Douglas Marshall et al v. Peter C. Amuso, et al, 2021 WL 53598020 (E.D. Pa. 2021) (a/k/a Pennsbury School District).

Pennsbury School District, like many schools across the Commonwealth of Pennsylvania, are part of PSBA's Policy Service and have adopted Policy 903, Public Participation at School Board Meetings.

Interestingly, Pennsbury also had a locally developed Policy 922 entitled Civility, that applied to all school activities.

Pertinent Portions of Pennsbury Policy 903 (Adopted November 19, 2020 and last revised June 17, 2021)

- Any taxpayer, school employee or student is allowed five minutes to make a comment, subject to certain requirements and restrictions.
- Speakers "must preface their comments by an announcement of their name, address, and group affiliation if applicable."
- Within the Policy itself, under "Delegation of Responsibility" the school board chair or the presiding officer may interrupt or terminate public comments deemed "too lengthy, personally directed, abusive, obscene, or irrelevant."
- The Policy also outlines that the presiding officer may also "[r]equest any individual to leave the meeting when that person does not observe reasonable decorum."
- Per Policy 903, the Board chair or presiding officer may "[r]equest the assistance of law enforcement officers to remove a disorderly person when that person's conduct interferes with the orderly progress of the meeting." Similarly, "offensive, obscene or otherwise inappropriate banners or placards, or those that contain personal attacks" are prohibited.
- Per the Policy, statements are "limited to five (5) minutes duration and the five (5) minutes shall include any time spent receiving answers to questions. Participants may not cede their five (5) minutes of participation time to other persons."
- The Pennsbury Policy also provided that "No participant may speak more than once on the same topic, unless all others who wish to speak on the topic have been heard."
- The Policy provides that "all statements shall be directed to the presiding officer; no participant may address or question Board members individually."
- Per the Policy the presiding officer may:
  1. Interrupt or terminate a participant's statement when the statement is too lengthy, personally directed, abusive, obscene, or irrelevant.
  2. Request any individual to leave the meeting when that person does not observe reasonable decorum.
  3. Request the assistance of law enforcement officers to remove a disorderly person when that person's conduct interferes with the orderly progress of the meeting.
- Individuals who repeatedly violate this policy may have restrictions imposed on their right to be present or to speak at School Board meetings.
- The Policy also provided that "Up to one (1) hour shall be designated for all public comment at all regular and special meetings of the Board prior to the voting portion of the meeting. The first

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Speech at Board Meetings

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public comment period shall be limited to speaking on topics as specified on the agenda only. This hour may be extended with the approval of the Board."

Background Facts

NOTE: In order to get a true flavor of this case, an individual needs to read the actual Federal Complaint that was filed.

In 2020, the COVID-19 pandemic temporarily shifted meetings to a virtual setting. The Pennsbury board received written submissions from speakers in advance of each virtual meeting and they were screened for violations of Policy 903. People publicly commenting were notified via email if their comments were rejected for any violation. Acceptable written comments were posted on Pennsbury's website.

In March 2021, Plaintiff gave a public comment without interruption. After the video from the Board meeting was posted on the District's website, Pennsbury decided to take the video off the website to remove the comments the District deemed, after-the-fact, to be in violation of Policy 903.

It needs to be noted two weeks after the Board edited the video and posted it, it was replaced with the full, unedited version.

At the May 2021 board meeting, three of the plaintiffs sought five minutes each to speak. Each was interrupted by the Assistant Solicitor for violations of Policy 903.

At the May 20, 2021 board meeting, Daly wanted to address what he phrased as Board member misrepresentation of facts surrounding the equity program in schools. The Assistant Solicitor then stopped him and indicated that the Board was not going to tolerate misrepresentation of facts. Daly responded and the Assistant Solicitor told him he could stop. When Daly asked the Assistant Solicitor whether he wants to do that, the Assistant Solicitor responded "Yes, I do." Daly then said "I'll see you in court." As he was leaving, the Assistant Solicitor shouted out "I said you are done! I said you are done! Mr. Daly, sit down."

At that same meeting, another plaintiff (Marshall) made statements relative to the curriculum wherein again the Assistant Solicitor told him he was getting into irrelevancies. When the Plaintiff attempted to state that he was explaining why it was relevant, the Assistant Solicitor kept shouting "You're done! You're done!" at Marshall.

When the third speaker, Mr. Abrams attempted to address the same topic, it is alleged that the Solicitor shouted "You're done!" eleven (11) times in all at Marshall. The Assistant Solicitor went on to state:

> You're done! You're done! We're not, we're not going through this again Mr. Abrams, that is not what the equity program is about. We're not going to sit here and listen to you. You're done! You're done! You're done!

After the three plaintiffs were thrown out, the Board considered its civility policy and the Superintendent stated "Our leaders cannot sit at the table and deal with harassment from ten feet away. That's why the civility policy is important."

At the June 17, 2021 Board meeting, two plaintiffs (Daly and Abrams) submitted comments to be read at the Board meeting.

Daly criticized the Board for filling Board vacancies "with controlled votes of preferred political party." Daly's comments were neither posted on line nor read.

Abrams wrote that the Board was attempting to silence the public. He also stated the District performed poorly, academically and financially, accused the Board of violating First Amendment rights and accused one of the defendants of financial improprieties. His comments were neither posted online nor read.

At the June 17, 2021 Board meeting, Plaintiff Simon Campbell also criticized Policy 903 and its curtailment of free speech.

On June 21, 2021 Daly submitted other public comments. Later that day, one of the defendants wrote back and indicated to Daly that his comments were being declined for being personally directed, abusive, obscene and/or irrelevant.

Ultimately, a lawsuit was brought and a Complaint for Declaratory and other Injunctive Relief was filed in the United States District Court for the Eastern District of Pennsylvania.

Holding:

The Court issued an Injunction prohibiting the School Board from enforcing certain parts of School Board policies that restricted free speech at public meetings.

The Injunction prohibited the District from enforcing those policies and prohibitions on speech deemed "personally directed," "abusive," "irrelevant," "offensive," "otherwise inappropriate," or "personal attacks."

It needs to be noted that the Court did not remove the prohibition of "obscene" comments, the "reasonable decorum" requirement, or the requirement to notify law enforcement of threats.

Looking at it in its totality, the Court determined that Policy 903 and Policy 922 were likely to be found subjective because what is abusive, offensive, irrelevant, or inappropriate varies from speaker to speaker and listener to listener and held that the policies would likely be deemed vague and overbroad because they overly restrict expression that is protected by the Constitution.

Take Aways:

Please keep in mind that in August 2021, PSBA put out a PNN that recommended to schools that they amend two policies to comport with the Sunshine Act Amendments of Act 65 of 2021. In early December 2021, PSBA had outlined that the Policy (903) is under review and that any updates to the Policy will be issued through PSBA's Policy News Network.

These types of cases are very fact specific. The facts in Pennsbury did not lend itself to a positive outcome for the District.

If a District is going to enforce prohibitions against "obscene" or "reasonable decorum" requirements, individuals should be reminded that they are disruptive or speaking out of turn, interrupting other speakers, or otherwise preventing the meeting to move ahead in an orderly fashion. If the language or speech is "obscene" the individual needs to be told to cease and if they do not, they will no longer be permitted to speak.

It is recommended that those individuals be given at least one warning before preemptive action is taken to state that they should be removed.

They should be told they are:

- Not recognizing someone else's time.
- Interrupting people and/or other speakers.
- Being disorderly.
- Being disruptive.
- Out of order.
- Preventing the meeting from moving ahead in an orderly fashion.

The District's Resource Officer or police can also assist in determining at what point the individual's conduct is turning toward being disorderly or harassing or otherwise interfering with reasonable decorum.

Naturally, if someone is using significant profanity, or can be construed as "obscene", then they should be warned and if they continue, be asked to leave.

At the end of the day, it is the responsibility of not only the participants but also the presiding officer or chair to navigate the delicate balance of violations of "reasonable decorum" when public comment is being received.

Court Rules District Improperly Excluded Student's Service Animal

The distinction between a "service animal" and a comfort animal" can become razor thin. However, under the Americans with Disabilities Act (ADA), the distinction is crucial. Under the ADA, students are entitled and have the right to attend school with a service animal, even if their individualized education plan (IEP) team or Section 504 planning team believes that a more effective, less intrusive accommodation would be better. Comfort animals are granted no such protections.

According to the ADA, service animals are defined as dogs that are individually trained to do work or perform tasks for people with disabilities. Some classic examples of such work or tasks include guiding people who are blind, alerting people who are deaf, pulling a wheelchair, reminding a person with mental illness to take prescribed medications, or performing other duties.

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Court Rules District Improperly Excluded Student's Service Animal

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But what if the task that the dog is trained to detect signs of anxiety and calm someone down? This is where the distinction between service and comfort can become tricky and was the focus of a recent case entitled C.G. v. Saucon Valley School District, 2021 WL 5399920 (E.D. Pa. 2021).

In that case, C.G. was a sixteen year old that had been diagnosed with numerous disabilities that altered her everyday life, including a history of and continued risk of experiencing seizures. Her risk of seizures was documented in her IEP, which contained a Seizure Action Plan (SAP). Due to her condition, C.G. obtained a "task trained service dog," George, who is trained to perform six specific tasks, one of which is to detect rising cortisol levels on C.G.'s breath, so he can calm her anxiety and alert others to a potential panic attack or seizure. If she does have a seizure, George senses it coming on and is trained to press himself against her to either stop her from falling or hurting herself. George is also trained to apply "deep pressure therapy" which is a potentially lifesaving technique.

Although C.G. had attended school for years without a service animal, as soon as the family saved up the $17,000 cost to get George and he completed his 1,500 hours' worth of training over two years, the parents immediately requested that George be allowed to attend school with their daughter. Saucon Valley responded to the parents' request by requesting proof of George's certification as a service dog and proof of C.G.'s certification as a handler. C.G.'s mother subsequently outlined the tasks that George can perform and provided the school with contact information to the organization that trained George. The Saucon Valley School District ultimately denied the request for a C.G. to bring George to school backing their decision with various reasons including: George did not qualify as a service dog, C.G. had attended school for numerous years before without a service animal, and George provided comfort rather than service.

After denial of the parents' request for C.G. to attend school with George, they filed a complaint alleging that Saucon Valley discriminated against her and violated the ADA and Section 504. The issue before the Court was C.G.'s motion to issue a preliminary injunction that would order Saucon Valley to allow C.G. to attend school with George while the case was litigated.

While reviewing C.G.'s motion, the court turned to whether C.G. could show a substantial likelihood that George qualified as a service animal by applying the factors set forth in the two-part service animal test delineated in the ADA regulations. The two-part test requires: (1) the animal to be "individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability," and (2) the tasks performed by the animal "be directly related to the individual's disability."

After reviewing all the tasks George can perform, the Court found that there was a substantial likelihood that George qualifies as a service animal. The Court also determined that C.G. will "suffer irreparable harm if the preliminary injunction is denied." Therefore, the injunction was granted and C.G. was permitted to return to school with George by her side.

From this, it is clear that the Court focused on the tasks that George was to perform and not that purpose of the task – to calm or provide comfort. Therefore, it is clear that it is the function and not the purpose of the tasks that distinguishes "service" from "comfort" animal.

Practice Note: When faced with a request as to whether an animal can accompany the child to school, the District should immediately reach out to its Solicitor or Special Counsel to discuss the situation. As this case demonstrates, making the wrong call as to whether the animal is not a "service animal" can result in unnecessary and costly litigation. It is recommended that this case be reviewed by Districts as it contains an excellent analysis of the current legal standards in play in service animal cases.

Beard Legal Group PC is pleased to announce the addition of three new associates to the firm

Joseph D. Beard is a graduate of Penn State University, Penn State Law. He is licensed before the Supreme Court of Pennsylvania and is a member of the Blair County Bar Association and the Pennsylvania Bar Association. Attorney Beard concentrates his practice in the areas of education law, labor and employment law and state and federal litigation.
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Shelby S. Gawley is a graduate of Ohio Northern University, Claude W. Pettit College of Law, Ada, OH and SUNY Buffalo State College, Buffalo NY. She is licensed before the Supreme Court of Pennsylvania. Attorney Gawley is a member of the Blair County Bar Association and the Pennsylvania Bar Association and concentrates her practice in the areas of education law, labor and employment law, and state and federal civil litigation.
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Margaret R. Thompson is an Altoona, Pennsylvania native and a graduate of the Ohio Northern University, Claude W. Pettit College of Law in Ada, OH. Prior to attending law school, she attended Saint Francis University in Loretto, PA where she obtained her Master of Business Administration, Master of Human Resource Management, and B.S. of Accounting and Management Information Systems degrees. Attorney Thompson joined the firm in May of 2020 as a legal intern and is now a full-time attorney concentrating her practice in the areas of education law, labor and employment law, and state and federal civil litigation. She is licensed before the Supreme Court of Pennsylvania and is a member of the Blair County Bar Association and the Pennsylvania Bar Association.
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Beard Legal Group PC Speaking Engagements:

- Carl P. Beard, Elizabeth A. Benjamin and Ronald N. Repak presented at the Pennsylvania School Study Council's Education Law Conference on October 26, 2021.
- Attorney Beard spoke on "Special Education Update and Learning from Other People's mistakes"
- Attorney Benjamin spoke on "Student Free Speech after Supreme Court Decision in Manahoy City School District (dealing with hate speech)"
- Attorney Repak spoke on "Title IX Update and What We Have Learned over the Past Year (Investigations, Hurdles, and Litigation)"
- Carl P. Beard presented as part of a Panel on January 20, 2022 for the PAIU Special Education Directors' Group relative to special education issues. *Should you desire a copy of the presentation, please contact rfisher@beardlegalgroup.com*
- Carl P. Beard and Jennifer L. Dambeck have been invited to present at the Council of School Attorneys' Spring School Law Seminar being held March 31 through April 2, 2022 in San Diego on "Pandemic Problems: Struggling with Student Mental Health"

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

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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Education Law Report is published by Beard Legal Group, P.C.

Prior issues are available on our website.

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