

## Student Who Recovered Only One Dollar in Sexual Harassment Suit is Eligible for Attorney Fees

**A** student at a school district alleged that she was sexually assaulted by a teacher in 2006. She alleged that when she entered his classroom to get a piece of candy, the teacher brushed his hand against her chest, felt her leg and up her skirt to her buttocks to “see if she shaved.”

Immediately after the incident, the student reported the conduct to the school secretary and the teacher was suspended from teaching. Another student made additional allegations against this teacher at the school and a criminal investigation began. However, this criminal investigation came to a close when the teacher committed suicide a little over a year later.

The student sued the district for violating her civil right to bodily integrity pursuant to Section 1983 and for State Law Torts of assault and battery. The estate of the deceased teacher was also joined in the action. The case was tried before a jury and the jury returned a verdict in favor of the student on her Section 1983 claim, the battery claim, and also found that the teacher’s actions were outrageous and he wantonly and maliciously acted in violation of the plaintiff’s rights. However, the jury declined to award the plaintiff any punitive damages for any of these claims, resulting in an award of the plaintiff of only \$1.00.

The plaintiff moved for the court to award attorneys’ fees pursuant to Section 1988 because she was the prevailing party in a Section 1983 claim. The District Court had considered whether or not the plaintiff’s award of nominal damages of \$1.00 was

sufficient to be a prevailing party in litigation brought pursuant to Section 1983 thereby entitling her to the receipt of attorneys’ fees.

In determining whether or not attorneys’ fees are available under a Section 1983 claim, the court will consider the degree of success obtained. The courts will look to three factors to determine whether plaintiff’s victory is substantial enough to merit an attorneys’ fee award: (1) the extent of the relief won as compared to the amount sought, (2) the significance of the legal issue on which the plaintiff prevailed, and (3) the public purpose served by the lawsuit. Ultimately, the District Court found the jury verdict was sufficient to meet these requirements and awarded attorneys’ fees to the student on her Section 1983 claim.

The court held that the student was entitled to attorneys’ fees because the jury agreed that the teacher violated the student’s right to bodily integrity and also found that the teacher acted wantonly, maliciously and outrageously in violating that right. The finding of wantonness and maliciousness indicated to the court that the jury believed the violation to be a serious one.

This indication is counter to the award; however, the court reasoned that it was likely that this award was a result of the jury’s reluctance to punish the teacher’s estate rather than a determination that the plaintiff’s victory was *de minimis*. She also achieved victory by assuring all female students that a male teacher could not touch a student’s bare leg, buttocks, or chest under any justification. The court considered

## *Harassment continued from page 1*

these accomplishments also to be substantial and to amount to more than “the moral satisfaction of knowing that a Federal Court concluded that [her] rights had been violated in some unspecified way.”

Another interesting aspect of this decision was that the court found that the public purpose served by litigation weighed strongly in favor of granting attorneys’ fees. The significant purpose served by this litigation was to protect students’ rights by deterring similar conduct against other students by teachers. In fact, the court noted that the plaintiff’s willingness to come forward with her allegations against a very popular teacher gave another student a chance to come forward with her allegations of sexual abuse at the hands of this teacher as well.

Also, the results of this case were important to the plaintiff because she was ostracized from the community for these allegations against a popular teacher and was forced to take a year off school. The verdict in her favor served the public purpose of rebuilding her reputation in the community which was unfairly tarnished through these allegations. Finally, the court held that this litigation served to provide the plaintiff with closure, as the teacher’s suicide prevented the plaintiff from receiving the closure that would have come about from a criminal prosecution. This suit served as the only means for the plaintiff to receive vindication for the violation of her rights. This issue also weighed heavily in favor of the attorneys’ fees.

Ultimately the court held that the plaintiff was a prevailing party in her Section 1983 claim against the teacher’s estate and was entitled to an award of reasonable attorneys’ fees in the amount of \$46,410.00, plus \$5,143.43 in costs. This case serves as a reminder to districts that sexual harassment claims in the district must be taken extremely seriously. Even if there are no punitive damages the impact of attorneys’ fees alone in Section 1983 cases can be a significant burden on the district’s finances. Also, this case illustrates the impact of sexual harassment issues in a school district upon the local community, and the district should always take care to ensure that

these situations do not arise and in the unfortunate circumstances where they may arise, the district must act swiftly to control these situations.

## **Commonwealth Court Interprets Sunshine Act**

In *Trib Total Media, Inc. v. Highland School District*, the Commonwealth Court considered the issue of what are the bounds of a Board’s right under the Sunshine Act to invite third parties into an executive session. The Board invited local business owners into an executive session conducted for litigation purposes to discuss a property tax assessment appeal.

After the regular public meeting of June 8, 2009, the Board announced that it would have an executive session to meet with the owners and representatives of the Heights Shopping Plaza to discuss the Shopping Center’s tax assessment appeal. The Board, the solicitor, and representatives of the Shopping Center attended the executive session; but the public, including a newspaper reporter, were not permitted into the session.

Under the Sunshine Act, an executive session is a “meeting from which the public is excluded, although the agency may admit those persons necessary to carry out the purpose of the meeting.” Local government units may hold executive sessions for only very specific reasons listed in the Sunshine Act. The Board referenced the right of an agency to “consult with its attorney or other professional advisor regarding information or strategy in connection with litigation or it hinges on which identifiable complaints are expected to be filed.

The Commonwealth Court first looked to the common definition of “consult,” which means to “ask advice” or “to seek an opinion.” Thus, the Commonwealth Court reasoned that the plain language of section 708(a)(4) of the Sunshine Act “reflects a legislative intent to facilitate the confidential exchange of views between the agency client and

## *Commonwealth Court Upholds Permanent Expulsion of Student for Hit List*

**D**uring the 2007-08 school year, an eighth grade student in the Gateway School District had created a hit list in a notebook that contained the names of about 20 students. A personal care aide was approached by three students during lunch and was informed by these students that they had seen this hit list. The personal care aide then passed this information on to the school principal.

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### Sunshine Act

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its counsel necessary for effective participation in adversary proceedings.”

But in this case, the Board was not conducting the executive session to seek advice from their solicitor in connection with the tax assessment appeal litigation; instead, the Commonwealth Court believed the Board gave the Shopping Center a private audience to argue in support of their position regarding the tax assessment appeal litigation. Including the representatives of the Shopping Center, the Board destroyed the confidentiality of the communications between the Board and its solicitor that this exception to the Sunshine Act was meant to protect.

The Commonwealth Court held that by destroying the confidentiality of the communications between the District and its solicitor by including a third party the executive session was taken outside the scope of the exception to the Sunshine Act. In the opinion of the Commonwealth Court, the special meeting had the “odor of favoritism” that the Sunshine Act was meant to prevent.

This interpretation of the Sunshine Act should give Boards pause before inviting third parties into executive sessions for litigation purposes. However, this does not affect a Board’s ability to negotiate a settlement to legal disputes through the solicitor or its counsel. The Board should be careful and consider whether or not the invitation of a third party into an executive session has the “odor of favoritism” prior to bringing the additional party into the session.

During the investigation of the aforementioned hit list, the principal had learned that another student was in possession of a hit list and it was this student who was the plaintiff in this lawsuit. The principal removed the student from class and discussed the hit list with the student. The investigation revealed that in three different notebooks owned by the student, there were three different lists of student names. The first list was entitled “People to Kill” and contained the name of one teacher and six students; the second list was entitled “People I Need to Kill” and contained a list of four names. The third list was untitled and contained the names of forty-eight different students.

The student was originally suspended for three days. Following an informal hearing six days after the original suspension, the student was suspended for an additional seven days. The student was scheduled for a formal hearing to be conducted ten days after the informal hearing. The formal hearing was set to determine whether the student’s exclusion from school should be continued or if the student should be expelled on a permanent basis.

At the formal hearing before the Board, the Board of School Directors decided to permanently expel the student from the District. After the Board rendered its decision, the parents filed an appeal of the Board’s adjudication with the Trial Court. The Trial Court vacated the District expulsion on the basis that there was not sufficient evidence to support the Board’s determination. The District and the Board then appealed the Trial Court’s Order to the Commonwealth Court.

The District and the Board argued that the Trial Court erred in determining that there was insufficient evidence to support the permanent expulsion of the student for a level 4 violation of the District’s discipline code. The District argued that the student’s behavior constituted “engaging in conduct so disruptive as to interfere with the orderly operation of the school or which creates a clear and present

## Commonwealth Court Rules That Teacher Addresses May Be Subject to Right to Know

**T**he Commonwealth Court has ruled that the release of current teacher addresses is covered under the Right to Know Law. The Court reversed its prior ruling on the injunction decision, wherein it had ruled that the teacher addresses did not need to be released.

The Pennsylvania Commonwealth Court ruled on Friday, September 24, 2010, that the Pennsylvania State Education Association did not have standing to sue the Office of Open Records as it relates to PSEA's efforts to deter Office of Open Records from ordering the release of

addresses under Pennsylvania's Right to Know Law. The Commonwealth Court stated that PSEA would have to sue a school district that released the information to properly pursue this matter. At this time, PSEA has filed an Appeal to the State Supreme Court.

PSEA had previously been successful in the initial filing on this matter which was upheld on Appeal by the State Supreme Court. What the September 24, 2010 ruling means for districts is not yet clear.

Considering the Court's September 2010 ruling

### *Hit List Continued from page 3*

danger to the health, safety, and welfare of students, staff, and school community." The Commonwealth Court agreed with the District's analysis and the argument presented before it.

The Commonwealth Court held that the disruption in this case was substantial enough to justify the level 4 discipline that resulted in the student's permanent expulsion. The level of fear and apprehension created by the student's possession of the three hit lists on the school premises was a sufficient violation to sustain the expulsion. The Commonwealth Court disagreed with the Trial Court on this premise, stating that it was not the remedial action of the District that caused the disruption, but in fact the apprehension and fear caused by the actual lists.

Students throughout the District were aware that they were on one of these lists but were unaware who created the lists. The principal testified that parents and students contacted him and expressed concern about the presence of the names of their children on these lists. Although the principal could not say for sure that the fear and apprehension caused by the lists resulted in actual absences, he did believe that communications from parents indicated that the hit lists did play a role in both student absences and parent fears. Further, the extensive additional

efforts needed by the District for contacting and communicating with the parents of the students whose names appeared on these lists also supported the claim by the District that this behavior caused a substantial disruption.

This case illustrates that where substantial disruption occurs the District may discipline the student under the Tinker Standard. Even though the Court felt that this language does not rise to the level of true threat, the activities created a substantial disruption through the level of apprehension and fear and the District's responsibilities for addressing the issues involved with the naming of students on these lists and the security and safety concerns of the parents, such that the student could be disciplined for what may otherwise be protected speech if there was not a substantial disruption.

The courts seem to be warming up to allowing Districts to have more flexibility and leeway in restricting student's speech when that student's speech is disruptive to the school environment. However, it is always important to consult with the District Solicitor when evaluating claims such as these or when disciplining a student for what may otherwise be protected speech.

## Pennsylvania Departments of Health and Education Release New Guidelines

The Pennsylvania Department of Health and the Pennsylvania Department of Education have recently released a revised version of “Guidelines for Pennsylvania Schools for the Administration of Medication and Emergency Care.” These guidelines can be located online at the Department of School Health website at [www.health.state.pa.us/schoolhealth](http://www.health.state.pa.us/schoolhealth). The Department of Health publishes

these guidelines in order to assist school districts in the development and implementation of policies for the administration of medications and provision of emergency care in the school setting.

These guidelines are created to incorporate both federal and state laws governing medication administration and national standards governing nursing practice in the school environment. These guidelines define the role of the certified school nurse regarding the administration of medications and the nurse’s role in the management of medications in the school setting. The guidelines and appendices provide districts with a number of resources, such as sample forms, clinical guidance, and policy examples.

These new guidelines are not only a joint effort between the Department of Health and the Department of Education, but also involved input from the Department of State and the Board of Nursing. These new guidelines replace any and all previous guidelines regarding the administration of medications in Pennsylvania schools. School officials should thoroughly review these guidelines and be sure they understand them to ensure that their medication policies meet all of the requirements of the new guidelines.

### *Teacher Addresses* *continued from page 4*

and PSEA’s pending appeal, when faced with a request for employee names and addresses, a district must determine whether it intends to release this information. The district must also determine if it believes that the employees have a constitutionally protected privacy right at stake. If the district takes this position, it can be relatively sure that the requester will appeal the district’s decision to the Office of Open Records and the Commonwealth Court’s decision will bolster the Office of Open Records direction requiring that the district turn over this information to the requester.

In any case, the district should consider invoking the thirty (30) day extension option under the Right to Know Law prior to granting the request so that the district may notify the affected employees and afford them an opportunity to raise their own objections. The employees also have the right to litigate this issue which may provide the Courts with an opportunity to resolve this issue once and for all.

The state legislature is currently considering several changes to the current Right to Know Law. We will keep you posted on the changes under consideration.

## *Temporary Transfer of Legal and Fiscal Custody of a Child Does Not Eliminate Parent's Standing*

In March of 2006, a juvenile court determined that a female student was a dependent child and awarded temporary legal and physical custody to Children and Youth Services. Shortly thereafter, CYS placed the daughter with foster parents who reside within the District.

Then, in April of 2007, there was a dispute between the District and the mother which ended with the District informing the mother's counsel that if she wanted to have a gifted IEP meeting to review her daughter's educational program, she could request that meeting in writing. Shortly after this exchange, a trial court conducted a permanency review for the placement of the daughter and declined to order the parents to cease and desist their involvement in the daughter's educational program. Neither the District nor the daughter's guardian ad litem took any further action regarding the mother's participation in the GIEP, nor did they appeal the trial court's order.

Then, three months later in July 2007, the mother pled no contest to the aggravated assault of the daughter and was sentenced to fifteen to thirty months incarceration. Then, one year later the District asked the mother, who was still imprisoned, to agree to an educational surrogate to approve the GIEP for the 2008-09 school year; however, the mother refused to agree to this request and the District did not take action to petition the trial court to appoint a surrogate.

Then, in September 2008, another trial court issued an order giving CYS the duty and the right to provide for the daughter's education. The court also refused the mother's request to have a private school psychologist evaluate and observe the daughter. The mother appealed the trial court's order.

Again, in April of 2009, the mother requested through her counsel that the District reschedule a GIEP meeting. The District refused to schedule this meeting and as a result the mother filed a due process complaint with the Department of Education's Office

of Dispute Resolution. The District raised questions regarding the mother's standing to file the due process complaint and the hearing officer directed both parties to file briefs in support of their positions. Subsequent to this briefing, the hearing officer dismissed the mother's complaint for lack of standing and this appeal to the Commonwealth Court followed.

The Commonwealth Court determined that the hearing officer erred when holding that the mother lacked standing to file a due process complaint for three reasons. First, a parent always has sufficient interest, and therefore standing to litigate issues concerning her child's education despite the temporary transfer of the legal custody of the child. A temporary transfer of legal custody is different from a permanent transfer of legal custody and wholly different from an involuntary termination of the parental rights.

The goal of a temporary transfer of legal custody is to eventually reunify the family unit. Thus, the temporary transfer of a child's legal custody does not entirely sever a parent's rights and duties. Further, Pennsylvania law specifically preserves a parent's interest in her child's GIEP providing that "parents may request in writing an impartial due process hearing concerning the identification, evaluation or educational placement of, or the provisions of a gifted education to, a student who is gifted or who is thought to be gifted if the parents disagree with the school district's identification, evaluation or placement of, or the provision of a gifted education to the student."

The Commonwealth Court has previously held that the temporary transfer of custody to an institution does not deprive the natural parents' standing to file a complaint regarding their child's education. Thus, since a parent retains her parental interests even in light of a temporary transfer of custody, the parent continues to meet the standing requirements to file a due process complaint. *(Continued next page)*

## District That Considered Diversity in Redistricting Process May Have Inappropriately Considered Race

**A** Pennsylvania School District is currently being sued because during its consideration of a redistricting plan for schools in the district, there was an inappropriate focus on diversity when determining the distribution of students within the district. The district did not have an express reference to the racial classifications when determining the organization of the students; however, another plan of consideration may have considered race sufficient to survive a Motion for Summary Judgment.

Board Members who were considering redistricting plans within the school district received data on how different plans would affect racial diversity in the school district. Further, there were communications between the Superintendent and the Board Members regarding the manner in which diversity was being accomplished in the district and the racial breakdown of student populations in the various districting plans. Board Members also commented and gave deposition testimony that the issue of racial distribution came up at the Board meetings and the racial distribution in various plans was discussed at these Board meetings.

Although this case is in the very early stages, it serves as a warning to districts that they must be careful not to consider race when setting the boundaries for attendance at different schools within their district.

Courts are aware that invidious racial discrimination does not need to be worn on the sleeve or carried on signs.

The court will look at the historical background of the decision-making process, the sequence of the events leading to the decision, departures from the normal procedural sequence, the legislative history, the administrative history, and any contemporary statements by members of the decision-making body, its minutes, meetings or reports. Under current Supreme Court precedent, there is no compelling government interest in diversity in the public school setting where there is no need to correct past incidents of intentional discrimination.

Districts must not consider explicitly racial classifications to achieve their stated diversity goals. There must be a serious good faith attempt to use race neutral alternatives to make decisions regarding districting and student distribution. If the redistricting plan is not narrowly tailored to avoid consideration of racial classifications, strict scrutiny analysis will apply. If the strict scrutiny analysis applies it will be next to impossible for the district's actions to survive judicial review.

However, in this case, strict scrutiny was not applied at the summary judgment stage. Questions of fact remain regarding what actually occurred in this decision-making process. Hence the court used the Celotex summary judgment analysis in determining that the case should continue moving forward because it was not ripe for determination at this time. Districts should be aware of this case because it illustrates many of the pitfalls that a district may run into when attempting to reform the balance of different buildings within their own borders.

Districts should seek the advice of counsel when considering redistricting plans or to make sure that they meet the requirements of current federal law and judicial precedent.

### *Temporary Transfer* *Continued from page 6*

Under this case, the temporary legal custodian does not have the exclusive right and duty to provide for a child's education. Thus, a parent continues to possess sufficient interest to grant standing in a due process complaint regarding the education of their child and such a complaint should be permitted a proper hearing.

## Andrews and Beard Education Law Focus

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

Our legal expertise includes: Negotiation of teacher and support staff contracts; Employment Discrimination; Special Education Litigation; Veterans' Preference Litigation; Teacher and Student Discipline Hearings; and Leaders in Timed Mediation Contract Negotiations.

### About the Pennsylvania School Study Council

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### *Subsequent Issues*

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