

# ANDREWS AND BEARD

# EDUCATION LAW REPORT

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## New Guidance on Student Searches

**T**he United States Supreme Court recently examined the constitutionality of student searches again, this time considering strip searches. In *Safford Unified School District No. 1 v. Redding*, the District searched a female student suspected of possessing and giving other students prescription strength ibuprofen.

Generally, student searches are subject to the reasonable suspicion standard which permits a search “when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” The standard is satisfied if the search has a “moderate chance of finding evidence of wrongdoing.”

In the case involving *Safford Unified School District No. 1*, the principal received information from two students that a female student was distributing prescription drugs from a day planner. The principal called the female student to his office to investigate. Although the student confessed to owning the day planner in which the prescription drugs were found, she denied knowledge of the pills and further claimed to have no pills on her person. She also claimed that she had loaned the day planner to another student.

As a result of the information obtained, the principal searched the student’s backpack. No contraband was found during the search of the backpack. The principal then took the student to the nurse’s office to have her person searched.

The student was directed by a female assistant principal and female nurse to undress down to her undergarments. The student was then directed to pull her bra away and the waistband on her underpants away from her body to allow the female school personnel to inspect her body.

In considering the constitutionality of the search performed by the female assistant principal and nurse, the Supreme Court recognized the sensibility of the school’s rule in banning all pills of any kind without advance permission. The Court also noted that the principal had sufficient information to meet the reasonable suspicion standard to search the student’s bag and external clothing.

However, because there was no evidence that the student possessed drugs (*Continued pg. 2*)

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## *Parent-Led Bible Reading in Kindergarten Classroom Prohibited*

In *Busch v. Marple Newtown School District*, the Third Circuit affirmed the lower court's ruling that permitted an elementary school to restrict a mother's reading of Bible verses to her child's classmates. This case involved a show-and-tell type of exercise, where students were given class time to make an "All About Me" presentation to the rest of the class. Following a student's presentation generally about the importance of religion in his life, the student's mother came to the class to read her child's favorite Bible verses to

the class. The elementary principal stopped her from reading Bible verses to the class because he did not want to risk an Establishment Clause violation.

The Third Circuit held that although public schools may take on characteristics of a public forum by permitting students to make presentations, in classrooms during school hours when activities are supervised by teachers, the nonpublic nature of the school setting is preserved. Hence, the School District may still regulate invited speech in the classroom. However, the ability of the District to regulate speech will be based on the type of speech, the age of the speaker, the age of the audience, the level of control the school exercises over the activity during which the speech occurs, and whether the school is soliciting the views of students during the activity. Thus, any inquiry into the appropriateness of this type of regulation will be based upon the specific facts at issue.

In reaching this conclusion, the Court opined that the younger the students are, the more acceptable it is for a District to regulate speech during organized curricular activities. For instance, in this case, because the students were very young and impressionable and because most children would look to the student's mother as an authority figure, it would be difficult for students to determine whether or not it was the student's speech or the speech of the School District.

According to the Court, restrictions on student speech during organized curricular activities are within the school's legitimate area of control and do not violate the First Amendment because it is through the orderly and structured school environment that the school imparts social, behavioral, and academic lessons. In summation, the Court will give deference to a District's curricular standards, especially when children are young and impressionable.

### Student Searches continued

which would pose a risk of harm to students, the Supreme Court ruled that the search into the student's undergarments was excessive. The Court opined that the degree of intrusion caused by the search exceeded the content and concerns of the principal's suspicion and that it is a "quantum leap" to move from searching clothing and a backpack to requiring a student to expose her genitals and breasts. The Court further explained that such an invasive search requires more than just a general suspicion that the student is carrying a drug on her person.

Based on the Supreme Court's decision, suspicion of possession of contraband which is not dangerous will not allow an administrator to perform a strip search of a student. School districts should not perform a strip search or search inside a student's undergarments unless there is a strong reason to believe that dangerous contraband has been concealed there. Before performing a search which would involve removing a student's clothing, a District should always contact their solicitor.

## Drug Abuse in the School Finally in Violation of Public Policy

**A**fter a seven year court battle, in July of 2009, the Commonwealth Court vacated an arbitration award that reinstated a suspended classroom assistant to her position, after being found unconscious on the school's bathroom floor as a result of a drug overdose from a Fentanyl patch for which she had no prescription. After being found on the bathroom floor in March of 2002, the classroom assistant, employed by the Westmoreland Intermediate Unit #7, was suspended without pay pending discharge for the incident.

The Westmoreland Intermediate Unit #7 Classroom Assistants Educational Support Personnel Association filed a grievance on the assistant's behalf. The grievance was originally granted by the arbitrator and the matter was subsequently appealed. The case made its way up to the Pennsylvania Supreme Court, which remanded the case back down to the Court of Common Pleas of Westmoreland County to apply the new "public policy" exception to the essence test.

On remand, the Court of Common Pleas upheld the arbitrator's decision for a second time concluding that the assistant's reinstatement did not violate the public policy established by the Public Employe Relations Act and Section 514 of the Pennsylvania School Code which establishes the public policies that apply to the dismissal of classified employees.

The Common Pleas decision was again appealed to the Commonwealth Court. The Commonwealth Court opined that as a matter of law schools have an "unmistakable duty to create and maintain a safe environment for the students." As a result of that unmistakable duty, the Commonwealth Court concluded that there is a fundamental public policy against allowing a person to be in possession or under the influence of drugs while caring for, supervising, or being in custody of children.

In addition to overseeing students, teachers and school personnel serve as mentors and role models for impressionable children. The Court concluded that if school personnel are intoxicated, their ability to perform these duties is impaired and may even pose a risk to the students as well as themselves.

The Commonwealth Court found that the legislature has taken affirmative action to eliminate this type of behavior by school personnel, through legislation. For example, pursuant to Section 1209 of the School Code, no teaching certificate will be granted to an individual who uses opium or other narcotic drugs in any form. Other legislative acts such as the School Zone Act, the Drug Abuse Resistance Education Fund, the Alcohol, Chemical and Tobacco Abuse Program, and Section 527 of the School Code, provide further evidence of the legislature's position against drug possession, use, and abuse in the school system.

Ultimately, the Commonwealth Court concluded that reinstating an employee who came to work under the influence of a Schedule II controlled substance was in violation of established public policy. The Court further opined that reinstatement of the assistant would place her back in the classroom during her rehabilitation, which is no place for a recovering addict.

## No Right to Hearing Transcript for Non-Indigent Party

**T**he Commonwealth Court recently reviewed an appeal involving a parental request to receive a copy of the transcript from a due process hearing and for the transcript to be translated into another language, in *Bethlehem Area School District v. Zhou*. The underlying dispute between the parent and school district involved a challenge to the appropriateness of the gifted education services being provided to the student. A due process hearing was conducted before a hearing officer for the Department of Education's Office of Dispute Resolution. The parents were provided with an interpreter for the proceeding. The hearing officer also ordered the order and opinion to be translated into the parents' language.

The parent also asked for a translated version of the transcript. ODR instructed the parent to ask the District. The District denied the request and the parent appealed. The Appeals Panel for ODR ordered

the District to provide a translated copy of the hearing transcript. In reaching its decision, the Appeals Panel relied on the ODR manual to require that the District provide a translated version of the hearing transcript.

The District subsequently appealed to the Commonwealth Court. The Commonwealth Court ruled that there was no authority for the Appeals Panel to order the District to provide a translated version of the hearing transcript. The Commonwealth Court held that the ODR manual was not a Pennsylvania regulation and did not have the force of law, thus it could not be cited to support the Appeals Panel's order.

Generally, parties have no right to a free transcript, unless the party has been determined to be indigent. Thus, without legislation or regulations providing for the provision of such a transcript, the District cannot be ordered to provide a transcript, let alone a translated transcript.

## *IDEA Authorizes Courts to Order Reimbursement*

**A** student attended public schools from kindergarten through his junior year of high school. Throughout his time in the District, teachers noticed that the student had trouble paying attention in class and completing assignments. Upon entry into high school, these difficulties increased. In the student's freshman year, his mother contacted the school counselor to discuss his problems with schoolwork.

The District examined the student and determined that he did not qualify for special education services. As the student's difficulties increased and he was diagnosed with ADHD and several other learning disabilities, the District continued to decline to provide special education services. The parents enrolled the student at a private academy and then obtained an attorney to ascertain their rights and provide written notice of the student's placement to the District.

An administrative hearing officer found that the District had failed to meet its obligations to the student under the Individuals with Disabilities

in Education Act (IDEA) in not identifying him as eligible for special education services. The District appealed to the district court, which overturned the hearing officer's decision after determining that the amendments to the IDEA bar reimbursement for private school tuition for students who were not previously provided with special education or related services. On appeal to the 9th Circuit, the district court was reversed.

The 9th Circuit's decision was appealed and heard by the United States Supreme Court, which held that IDEA authorizes reimbursement for private special-education services when a public school fails to provide a Free and Appropriate Public Education (FAPE) and the private-school placement is appropriate, regardless of whether the child previously received special-education services through the public school. In prior precedent, the Supreme Court had authorized lower courts to order private school tuition reimbursement (*IDEA continued next page*)

## *Exercise Care When Making Changes Under Status Quo*

**D**uring contract negotiations for a successor collective bargaining agreement (CBA) between Coatesville Area School District and Coatesville Area Teachers' Association, the District eliminated or combined several extracurricular positions due to budget constraints. Under the terms of the CBA, teachers were paid for extra-curricular activities. The changes to these positions occurred after the term of the prior CBA expired.

The Association grieved the District's action claiming that although the prior CBA had expired, a successor contract was not in place and that the District was prohibited from unilaterally eliminating or combining extracurricular positions under the status quo doctrine. The Association also relied on language in the CBA which stated that the District would not reduce the number of activities and clubs

below the amount that existed at the end of the 1999-2000 school year.

In response, the District argued that the School Code gave the District the sole management authority to establish or eliminate extracurricular positions. The District also argued that the subject of extracurricular positions was not a mandatory subject of bargaining, and that the provisions in the expired CBA were no longer binding on the parties.

The dispute proceeded to grievance arbitration. The arbitrator agreed with the Association and held that the District violated the CBA when it unilaterally combined and/or eliminated extra-duty positions. The arbitrator also found that the extracurricular activities were mandatory subjects of bargaining because it was an issue that impacted wages, hours, and terms and conditions of employment.

The decision was appealed, ultimately reaching the Commonwealth Court. The Court agreed with the arbitrator to the extent that the CBA provisions regarding extracurricular positions continued to apply while the parties were negotiating based on the doctrine of status quo. The Commonwealth Court disagreed with the arbitrator's conclusion that the issue of extracurricular positions generally is a mandatory subject of bargaining, but is one that is an inherent managerial prerogative. However, the Court ruled that even though it is not a mandatory subject of bargaining, once the District chooses to include language in the CBA that governs matters of inherent managerial prerogative, as in the Coatesville case, the District is bound by that language. Thus, the District continued to be obligated to follow the language in the CBA.

As a result of this decision, prior to making changes during status quo, Districts should carefully consider the language bargained into any CBA and seek the advice of qualified labor counsel in order to potentially avoid costly mistakes.

### IDEA continued from page 4

to parents where the District failed to provide the student with a FAPE and the private school placement was appropriate.

The Supreme Court reasoned that the U.S. Congress was aware of prior precedent and adopted the judicial interpretation of these provisions of IDEA when the Congress reenacted IDEA without change. Further, the District's position that reimbursement should only be available where the District has provided inadequate special education services and not where the District has provided no special education services would lead to absurd results. If this interpretation were adopted, parents who received inadequate services would have a remedy, but parents whose students were unreasonably denied special education services would be left with no remedy. School Districts are on notice that the IDEA authorizes courts to order reimbursement, even where the District has not previously provided special education services.

## Andrews and Beard Education Law Focus

**A**s solicitors, labor counsel and special counsel, Andrews and Beard represents more than 100 School Districts in Pennsylvania. The Firm has successfully negotiated hundreds of teacher and support staff contracts. Andrews and Beard is also one of the first firms in the state to pioneer Timed Mediation to successfully negotiate teacher-union contracts in a 48-hour process. This process can result in the settlement of the contract six months before expiration, at a large financial savings to the School District.

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

**T**he 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/](http://www.ed.psu.edu/pssc/) or contact the Executive Director Dr. James P. Hartman at [jhartman@psu.edu](mailto:jhartman@psu.edu).

### *Subsequent Issues*

If you have a school law question or topic you would like to have addressed in subsequent issues of the newsletter, please send an email to:

David Andrews: [dandrews@andrewsbeard.com](mailto:dandrews@andrewsbeard.com)  
 Carl P. Beard: [cbeard@andrewsbeard.com](mailto:cbeard@andrewsbeard.com)  
 Patrick J. Fanelli: [pfanelli@andrewsbeard.com](mailto:pfanelli@andrewsbeard.com)  
 Aimee L. Willett: [awillett@andrewsbeard.com](mailto:awillett@andrewsbeard.com)  
 Elizabeth Benjamin: [ebenjamin@andrewsbeard.com](mailto:ebenjamin@andrewsbeard.com)  
 Jason M. Imler: [jimler@andrewsbeard.com](mailto:jimler@andrewsbeard.com)  
 Zoe E. Babe: [zbabe@andrewsbeard.com](mailto:zbabe@andrewsbeard.com)

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**ANDREWS  
& BEARD**  
**LAW OFFICES**

MAIN OFFICE:  
 3366 Lynnwood Drive P.O. Box 1311  
 Altoona, Pa 16603-1311  
 814/943-3304 FAX: 814/943-3430  
[www.andrewsbeard.com](http://www.andrewsbeard.com)