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QUICK ACTION IS KEY TO DISMISSAL OF SEX ABUSE CHARGES

The dismissal of two recent federal cases filed in the Western District Court of Pennsylvania involving allegations of sexual abuse by school employees underscores the need for appropriate school district officials to take prompt action in response to complaints.

First, in *Maier v. Canon-McMillan SD*, 2009 WL 2591098 (W.D. Pa. 2009), a female high school student and her family filed suit against the District, Superintendent, High School Principal, girls' softball team coach and a former volunteer girls' softball coach and employee in the District's IT Department, Justin Bedilion. The suit alleged claims based on violations of Title IX, Section 1983 and the Pennsylvania Constitution arising out of a sexual relationship between the female student and Bedilion following her participation on the girls' softball team. The student's parents learned of the sexual relationship after examining their daughter's cell phone records and finding a staggering number of calls made between Bedilion and their daughter at all hours of the day. The suit alleged that the District and its officials failed to investigate the allegations and that the District created or permitted a sexually hostile environment for the female student.

The case was assigned to District Judge Gary Lancaster, and following discovery, Judge Lancaster granted the Motion for Summary Judgment filed by the District, its Superintendent, the Principal and the coach and dismissed the suit. Judge Lancaster identified the following undisputed facts: (1) The High School Principal spoke to Bedilion upon his appointment as volunteer coach in 2005 and instructed him to avoid circumstances which might give rise to inappropriate actions; (2) In the fall and winter of 2005, the District became aware that coaches of various sports, including girls' softball and including Bedilion, were providing rides in their personal cars to practices, games and home to players; (3) The coaches were immediately directed to discontinue this practice; (4) The coach received a complaint concerning Bedilion goofing around and calling players, but there was no allegation of any sexual or other inappropriate relationship underlying those allegations; (5) They were investigated, and Bedilion was counseled regarding his behavior; (6) The same day the student's parents complained about the phone calls, the Superintendent met with them, suspended Bedilion from his activities and further contact with the team and secured his resignation from the team and his IT position; (7) Prior to the phone call from the parents, no one had filed any allegations of sexually inappropriate conduct against Bedilion. On these facts, Judge Lancaster found that there was no knowledge or deliberate indifference on the part of the District, but to the contrary, the District acted promptly at the first sign of any complaint. Thus, the District did not violate the student's rights as a matter of law.

Second, in *Haines v. Forbes Road SD*, 2009 WL 89323 (W.D. Pa. 2009), the families of two female students within the Forbes Road School District brought suit alleging Section 1983 liability on the part of the District for sexual assaults perpetrated by a history and earth science teacher upon an eighth grade female and a ninth grade female during the 2005-2006 school year. The assaults occurred in the The Pennsylvania legis-

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classroom and classroom closet, and on some occasions, the teacher gave the eighth grade student a hall pass to come to his room, where he would assault her. The two incidents of ongoing assault were discovered within a two-day period in March 2006 after the ninth grade student reported the abuse to the School Secretary and was asked to complete a harassment complaint. The District's Superintendent and School Principal were alerted to the allegations and investigated them promptly, resulting in the teacher's suspension from his teaching duties within a few days. The families alleged the District had failed to train its personnel to adequately respond to the allegations, and sought to impose liability under Section 1983 on that basis.

The case was assigned to Chief Judge Yvette Kane, and following the completion of discovery, Judge Kane granted the Motion for Summary Judgment filed by the District. The record developed in discovery demonstrated that the District responded promptly to the students' complaints, and there had been no previous allegations of inappropriate sexual conduct against the teacher. There had been a prior allegation of inappropriate sexually-related comments by the teacher, and some suggestion of rumors or other stray remarks by students concerning the teacher's conduct. Judge Kane found that these did not rise to the level necessary to create liability on the part of the District. Judge Kane found that the alleged failure to train must be causally connected to the harm suffered by the female students, and Judge Kane found that the plaintiff families were unable to show that rigorous training would have prevented the harm suffered by the students. Thus, the plaintiffs failed to meet their burden. However, a note of interest is that the plaintiffs limited their cause of action against the District to failure to train under Section 1983. It is possible that the uninvestigated allegations of inappropriate comments might have given rise to a claim for a Title IX violation.

In conclusion, these two cases demonstrate that school districts can protect themselves from liability by acting promptly and thoroughly in response to complaints of sexual impropriety. To ensure that your district is prepared to act promptly and thoroughly, administrative staff must review with building-level personnel the relevant district policies regarding harassment and abuse and the investigative procedures and protocols in place in the event that a complaint is received. In this arena, an ounce of prevention is truly worth a pound of cure.

CHILDREN'S HEALTH COVERAGE OPTIONS EXPANDED

lature recently adopted a measure which permits employers, including school districts, to expand the health insurance coverage available to employees' children. Act 4 of 2009, signed into law in October of 2009 and effective January 1, 2010, requires that any insurer issuing a group health insurance contract within the Commonwealth of Pennsylvania must offer an option to the policy holder to extend the term of coverage available to employees' children.

Specifically, policy holders can now elect whether to modify their health insurance contract to offer employees, at the employee's own expense, coverage for an employee's child extending through the year the child is twenty-nine (29) years old, provided that the child is (1) not married, (2) has no dependents, (3) is a Pennsylvania resident or a full-time student in an institution of higher education, and (4) is not covered by any other group health insurance policy or eligible to receive benefits under any government health care program, including Social Security. Under the Act, insurance companies are permitted to determine the increase in premiums related to extending coverage for an employee's child from the age of 19 through the age of 29, with that increase to be borne by the employee choosing the coverage. To avoid any confusion, employee payment requirements should be clarified with each employee groups' Union. The additional right to elect insurance granted under Act 4 of 2009 do not apply to certain policies, such as hospital indemnity insurance, accident insurance, certain specified disease insurances, disability income insurance, dental insurance, vision insurance and other types of insurance.

Thus, beginning in 2010, when entering into a new health insurance contract or renewing an old one, districts have the option to direct their insurers to provide extended coverage for employees' children so that they will be covered through the age of 29, with electing employees paying for the additional premium amounts incurred by this extension. It is also important to note that there is nothing in Act 4 of 2009 which requires employers to provide this extended health care coverage, and nothing requires employees to buy coverage for their children for an extended time if the employer chooses to have the health care insurer provide it. In short, the new Act merely provides an opportunity for employers to elect whether or not this option will be made available to employees by insurers. Depending on the circumstances and employee interest, it may be worthwhile for your District to explore this possibility with your insurer.

In 1969, the U.S. Supreme Court upheld the right of students protesting the Vietnam War to wear black armbands to school in *Tinker v. Des Moines Independent Community SD*. In the intervening 41 years, very few Supreme Court or Third Circuit Court of Appeals cases have addressed student free speech. Generally, students possess free speech rights provided the speech does not cause a material disruption to a school's educational operations, and provided the speech is not lewd, obscene or advocates illegal activity.

On February 4, 2010, the Third Circuit announced two decisions involving student internet speech critical of district personnel. Both cases involved disciplinary actions taken by districts against students who created insulting profiles of school principals on the website myspace.com using home computers after school hours. Rather than bringing clarity to the law for the sake of school districts and students alike, the two decisions appear contradictory.

In *Layshock v. Hermitage SD*, a high school senior used his grandmother's computer to create a myspace profile for his principal. Layshock cut-and-pasted the principal's photo from the District's website and made insulting statements which intimated drug and steroid use. The profile was discussed and accessed in school by students. The District limited computer usage to classes in supervised labs until myspace.com could be blocked by network administrators. Around that time, three other students made profiles of the principal, each more vulgar than Layshock's. Layshock's profile was brought to the attention of administrators, and he was given a 10-day out of school suspension, placed in alternative education, banned from extracurricular activities and forbidden to participate in his graduation ceremony.

In response, Layshock filed a federal complaint alleging violation of his free speech rights and sought an injunction to return him to the regular school program. The injunction was denied, but after mediation, the District permitted him to return to the regular school population, resume extracurricular activities and participate in graduation.

The District argued before the lower Court that Layshock's creation of the fake profile substantially disrupted the District's educational operations, but the lower Court found that the disruption, if any, did not occur from the profile itself, but from the District's response to the profile. Before the Circuit Court, the District argued that the profile was not entitled to First Amendment protection because it contained vulgar and obscene language. The Circuit rejected this argument, following cases which hold that school officials may regulate obscene or indecent speech if it takes place on school grounds or at school events, but not if it occurs after school. The District argued the speech occurred on school grounds as the student accessed the District's website to copy the principal's photo, but the Circuit Court rejected this argument and reiterated that school districts have lawfully punished students for off-campus speech only where threatening speech was directed toward students or employees, and in each of those cases, the threats created a material disruption to school operations. Accordingly, as Layshock's profile contained no threatening language, took place off-school grounds and did not create a substantial disruption, he could not be punished for it. Accordingly, the Third Circuit affirmed the lower Court's finding that Layshock's First Amendment rights were violated.

J.S. v. Blue Mountain SD, from the Middle District of Pennsylvania, involves a 14-year old eighth grade honor student, J.S., who composed a fake profile of her principal on a home computer after what she perceived as unfair treatment by him in disciplining her for a dress code violation. J.S. and a second student composed the profile in collaboration on-line at separate computers, and insulted the principal's wife, a school Guidance Counselor, and insinuated that the principal was a sex addict and pedophile. Word of mouth spread among students about the profile, but it could not be viewed in school because the District's network administrator previously blocked access to myspace.com. A student told the principal about the profile, then brought in a printout for the principal and identified J.S. as its creator. Within days of the profile being created, the principal had it removed from the site. J.S. apologized to the principal without prompting, but was suspended for ten days out-of-school.

In response, J.S. filed a federal lawsuit alleging First Amendment violation. The lower Court granted the District's summary judgment motion and dismissed J.S.'s claims because the language contained in the profile was profane and obscene, and thus not entitled to protection. The Circuit Court went even further, and affirmed the lower Court on the grounds that J.S.'s creation of the myspace profile violated the Tinker test. The facts of record showed, however, that the disruption suffered by the school was limited to a few instances where teachers asked students to stop talking about the profile and where exams were proctored by replacement personnel while an investigation occurred. This was irrelevant, the Third Circuit held, as it read Tinker to permit discipline where a substantial disruption was likely to occur, without requiring proof it did occur. In the Court's view, allegations of pedophilia and sex addiction undermined the principal's authority with students and parents, and school operations would suffer if the speech went unpunished. Discipline was justified. One of the three judges dissented and argued that potential disruption was an improper standard. No actual disruption occurred since the statements in the profile were so incredible that any hearer would disbelieve them. The principal's authority would not be undermined. The dissent argued that the J.S. case should be governed by the same reasoning in Layshock. In response, the majority noted Layshock in passing, but stated that its facts were distinguishable and justified a different result.

How could the Third Circuit reach two directly contrary results? The answer, in part, lies in the Court's judicial structure. The Circuit Court consists of nine (9) sitting judges. Most appellate cases are decided by a panel of three (3) judges. The Layshock and J.S. cases were decided by two separate panels, with no common judges hearing both cases. Consequently, the analysis was completely different. Given the inconsistency between the cases and the resulting uncertainty, the Court may entertain another case to settle the conflict. Until then, school districts should follow the more restrictive Layshock holding and refrain from disciplining student off-school internet speech unless it causes a substantial disruption in school operations or conveys true threats. As Layshock arose from the Western District, it's likely that other Western District courts will defer to its holding until the conflict is resolved. By following the Layshock holding, what your district may lose in disciplining student internet speech will be offset by the security that litigation may be avoided.

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SEMINAR ON SCHOOL LAW IN THE TWENTY-FIRST CENTURY TO BE HELD APRIL 16, 2010

Russell Lucas of MB&M's School Law Group will be one of the three faculty members for a seminar to be offered in Pittsburgh on April 16, 2010 entitled "School Law in the Twenty-First Century." The seminar, sponsored by the National Business Institute, is targeted to school administrators, both central office and building-level, other school professionals, and attorneys. The topics to be addressed will be: (1) the boundaries of student and teacher rights to free speech, privacy, religious expression and due process; (2) student discipline and expulsion; (3) search and seizure in schools; (4) school liability and immunity; (5) technology issues on and off school grounds; (6) school safety concerns; and (7) God in the classroom. The seminar will be held at the Pittsburgh Marriott City Center, located at 112 Washington Place, and will run from 8:30 a.m. to 3:30 p.m. You may register for the seminar at www.nbi-sems.com or by calling 800-930-6182. Please feel free to contact our office or NBI directly if you wish to have a full brochure sent to you. The seminar will be worth 5.5 CLE credits and 5.5 teacher education credits.