Spring 2010

EDUCATION NEWS

BULLYING AND CYBER-BULLYING: IS YOUR SCHOOL DOING ALL IT CAN

On January 14, 2010, a fifteen year-old girl in South Hadley, Massachusetts named Phoebe Prince committed suicide after she had been the target of bullying by several older students over the course of several months. The bullying took the form of verbal harassment and physical abuse and occurred both on and off school grounds A public outcry followed when it became widely reported that many individuals, teachers and students alike, were aware that Prince was being bullied. After investigating, the local District Attorney took the extraordinary step of filing criminal charges against an 18 year-old student and two 17 year-old students for various offenses including statutory rape, criminal harassment, disturbance of a school assembly and violation of civil rights arising out of the treatment of Phoebe Prince. Three other female students were charged with juvenile offenses, such as violation of civil rights with bodily injury resulting and stalking. Those charges are still pending as this publication goes to press. On April 29, 2010, the Massachusetts legislature responded by unanimously passing a comprehensive anti-bullying statute. Given the rise of cyberbullying and the media attention paid to the Phoebe Prince matter and other publicly-reported tragedies, it is clear that school bullying will be a topic that is widely discussed in education circles for the foreseeable future. Is your school district doing everything at your disposal to combat bullying?

The Pennsylvania Legislature was a year or two ahead of the trend in addressing school bullying. Act 61 of 2008 amended Chapter 13 of the School Code to require that all public School Districts adopt a policy or amend an existing policy concerning bullying. The deadline to adopt or revise a bullying policy was January 1, 2009, and a District's bullying policy must meet the following requirements:

(1) The policy must describe the consequences for bullying and address the District's approach to prevention, intervention and education regarding bullying
(2) The policy must identify the appropriate staff member to whom reports of bullying should be made;
(3) The policy should recite the Act's definition of bullying, which must include harassing activities conducted through the use of electronic devices (cyberbullying) and may define "school setting" to prohibit bullying both on- and off-school premises, if the off-school premises bullying impacts a student's ability to receive an education or disrupts school operations.
(4) The policy must be specifically incorporated into the District's Code of Student Conduct;
(5) The policy must be available on any District-maintained website and be posted or available within each classroom;
(6) The policy must be posted in a prominent location in each District school building in a place where notices are typically posted;
(7) Districts must discuss the provisions of their policy within 90 days after adoption, and thereafter at least once each school year; and
(8) Districts must review their bullying policy every three (3) years and provide a copy of the policy to the Secretary of Education.

There was a rush by many Districts following the passage of Act 61 of 2008 to make sure a compliant policy was in place by the deadline, but what has your District done since that time? Has your staff been trained in combating bullying or the proper responses when observing bullying or receiving complaints? Have you sought out specialized training or seminars for your administrative or guidance staff? Has your policy been posted as required and reviewed with the student population? Is the prevention and combating of school bullying a topic of discussion in your in-services, faculty meetings or student assistance meetings? Have you reviewed the effectiveness of your complaint procedure to see whether your staff is responding promptly and appropriately to any complaints received? It's not difficult to meet the technical requirements of Act 61 by adopting, posting and discussing an anti-bullying policy, but has your District been able to take the advanced step of inculcating the spirit of the policy into your operations?

In general, the obligation faced by districts in addressing bullying complaints mirrors the requirements imposed in responding to a sexual harassment complaint lodged by an employee or student. A District must be able to demonstrate that it has in place an effective complaint process whereby complaints can be made to a designated individual or individuals. If a complaint is received, a District is obligated to investigate the complaint thoroughly and promptly and to take proper remedial action if the allegations in the complaint are founded. A District can fulfill its legal obligations regarding harassment complaints by showing

INSIDE THIS ISSUE:

that a complaint was either not reported or brought to the District's attention, or by showing that the District investigated a complaint and acted appropriately in response. Bullying complaints should be addressed in the same manner by ensuring that every complaint is thoroughly investigated by administration. To accomplish this, you should make sure that any bullying complaints received by teachers, counselors or other staff are communicated to the principal or other administrator charged with investigating complaints.

With bullying, the conduct often extends outside of the school day into times and places not usually the subject of school intervention. The amendments to the School Code permit Districts to go further than was previously thought to be possible in disciplining bullying. Specifically, the new law permits a District's anti-bullying policy to encompass acts that occur outside of a school setting if they cause the same impact on student learning and disruption of school operations as on-site bullying. This gives more authority to school officials to discipline off-school conduct if it can be shown that the conduct has an impact in school, and is particularly useful in the context of cyber-bullying. If you intend to discipline off-school conduct under your bullying policy, you must be certain to document specifically how the off-school conduct has disrupted school operations or prevented a student from receiving the full benefits of education. Further, as discussed in the Litigation Alert on page 2 of this edition of the Education News, the two student free speech cases currently pending before the full Third Circuit Court of Appeals may impact the ability of Districts to take disciplinary action against off-campus speech. We will update this matter in future editions of Education News.

In anticipation of the upcoming school year, your District's administrative team should take a look at your school operations and decide whether more can be done to combat bullying. In planning your in-services, orientations and training sessions, you should check to see whether your District is continuing to train staff in bullying response and prevention. Right now, before it becomes a problem, is the time to ensure that you're doing what you can.

LITIGATION ALERT:

Full Third Circuit to Reconsider Two Student Internet Speech Cases.

In the Winter 2010 edition of Education News, we discussed at length the two inconsistent decisions of the Third Circuit Court of Appeals issued on February 4, 2010 concerning student internet speech and school disciplinary codes. In brief, one panel of the Court found in *Layshock v. Hermitage SD* that a 12th grade student could not be suspended for making an insulting myspace.com profile of his school principal outside of school time, while a separate panel of the Court ruled in *J.S. v. Blue Mountain SD* that an 8th grade student could be suspended for creating a vulgar profile of her school principal outside of school time. Given this inconsistency, we recommended that Districts take a conservative approach until the issue could be resolved by the Courts. That resolution may be coming sooner than expected.

On April 9, 2010, the Circuit Court vacated the panel decisions in both the Layshock and J.S. cases and agreed to have both reheard by the full Circuit. Oral argument was held on June 3, 2010, and a decision in both cases will follow at some point in the next year. We may at last get a definitive word as to the application of the First Amendment and the Pennsylvania School Code to student off-campus internet speech, or it may be just a precursor to more litigation. We will update this matter in future editions.

EXPULSION BASED ON "KILL LIST" REINSTATED

In an unpublished opinion, the Pennsylvania Commonwealth Court recently reversed a lower court's decision and reinstated a student expulsion based on terroristic threats. In the Fall 2009 edition of MB&M's Education News, we highlighted the case of *Shelby L. Jones v. Gateway School District*, which involved an eighth grade female student who was permanently expelled from the Gateway School District after the District discovered that she had three handwritten lists, one of which was titled "People to Kill" and included the names of her teacher and six classmates, while the other two lists contained different names and language but appeared to have been created for the same purpose. The School Board permanently expelled her for violating the Code of Conduct's prohibition against terroristic threats and for causing a substantial disruption to orderly school operations. The student appealed her expulsion to the Court of Common Pleas which reversed the expulsion and reinstated her on the basis that the lists were not actual threats because the student kept them to herself and never acted violently or aggressively toward the individuals named on the list. The Court found that any educational disruption was not caused by the lists themselves, but by the District's investigative and disciplinary response to them. The case is of significant importance to school officials who are periodically faced with deciding whether a student's verbal or written statements constitute true threats or whether they can be punished as unprotected speech if a substantial disruption to orderly school operations occurs. As we reported in the Fall, the School Board appealed the Court's decision to the Commonwealth Court.

On March 26, 2010, the Commonwealth Court reversed the lower court and reinstated the student's expulsion. The Commonwealth Court first noted the principle that school boards have broad discretion to adopt and enforce rules regarding

student conduct, which includes the authority to expel students under Section 1318 of the School Code in circumstances where the Board determines expulsion is appropriate. Accordingly, the Court stated that the Board's decision to expel the student would be upheld unless the Board acted in a manner that was arbitrary, capricious or prejudicial to the public interest.

In support of its decision, the Commonwealth Court cited the Pennsylvania Supreme Court decision in *J.S. v. Bethlehem Area School District* where the Supreme Court addressed the expulsion of an eighth grade student who created an off-school website which made derogatory and profane comments about his teacher and principal, contained an image of his teacher's severed head changing into a picture of Adolph Hitler and listed reasons why his teacher should die. The Supreme Court found that the statements at issue did not constitute true terroristic threats against the teacher and principal, but upheld the expulsion on the basis that orderly school operations were substantially disrupted by the website. The teacher named in the site was disturbed and had to take a leave of absence for the remainder of the year. Students, staff and parents were also anxious over the safety of the school environment in light of the statements made on the website. As a result, some disorder was caused. On these facts, the J.S. Court found that there was no violation of the student's Fourth Amendment rights by punishing his speech, and the expulsion was upheld.

Relying on the J.S. decision, the Commonwealth Court held that the Gateway School Board relied on substantial evidence in expelling the student for disrupting the orderly operations of the school. The Commonwealth Court referred to the testimony of the Assistant Superintendent that the student's "Kill Lists" created a disruption because a sense of fear and anxiety was created after the District contacted the students and their families to inform them that the lists existed but were unable to confirm certain other details because of student confidentiality. There was also a substantial disruption due to the necessary investigation, calls and letters which consumed a significant portion of the administration's time for several days. In the Commonwealth Court's view, this constituted substantial evidence supporting the Board's decision to expel the student.

The Pennsylvania Supreme Court's decision in J.S. has been criticized by the federal judiciary in recent cases involving whether student off-campus speech—most notably in the form of fake facebook and myspace profiles of school officials—can be the subject of discipline by school districts. However, the Commonwealth Court's reliance on J.S. was for the principle that School Districts possess the ability and discretion to determine whether particular student speech constitutes a disruption to orderly school operations, and to take disciplinary action accordingly.

Although the Commonwealth Court's decision is not precedential because it is unpublished, it still has an important impact for your District because it signals that the appellate courts will provide deference to school boards in determining whether student speech should be punished. Following the rationale of the Shelby Jones case, it is not necessary for a Board to find that a student's statements constitute a true threat within the meaning of a Code of Conduct or a criminal statute if the Board is able to find substantial, credible evidence that the student's speech disrupted school operations.

EXPERIENCED ATTORNEYS JOIN PUBLIC SECTOR LAW TEAM

Roger W. Foley, Jr. and Lawrence H. Baumiller have joined the firm and will be working within our Public Sector Law Team.

Roger W. Foley, Jr. has fifteen years experience and will focus his practice on litigation, school and municipal law, and construction litigation. Prior to joining the firm, Mr. Foley specialized in municipal law having served as the solicitor for various municipalities and other municipal authorities and agencies including water and sewage authorities, zoning hearing boards and planning commissions. Mr. Foley has also served as special counsel regarding the defense of various state, county and local public entity claims.

Lawrence H. Baumiller will focus his practice in the areas of school and municipal law, zoning and litigation. Prior to joining Maiello Brungo & Maiello, LLP, Mr. Baumiller practiced in the areas of zoning and land use, tort defense and civil rights litigation as an Assistant City Solicitor at the City of Pittsburgh Department of Law.

Visit the Attorneys section of our website, www.mbm-law.net to learn more about Roger and Larry.

MB&M EDUCATION NEWS

Spring 2010

MICHAEL L. BRUNGO HEADS DISCUSSION AT SCHOOL SOLICITORS' SYMPOSIUM

Michael Brungo of MB&M's School Law Team will lead a round table discussion at the PSBA School Solicitors' Symposium on July 8-9, 2010. The discussion will focus on the impact of Federal Health Care Reform legislation on public school collective bargaining and contract drafting strategies. The event will be held at Penn Stater Conference Center at State College.

Visit www.psba.org/workshops to register online.

The MB&M School Law Team:

Alfred C. Maiello	acm@mbm-law.net
Michael L. Brungo	mlb@mbm-law.net
David Raves	dr@mbm-law.net
Falco A. Muscante	fam@mbm-law.net
R. Russell Lucas, Jr.	rrl@mbm-law.net
Donald A. Walsh, Jr.	daw@mbm-law.net
Jennifer L. Cerce	jlc@mbm-law.net
Beth Fischman	bf@mbm-law.net
Roger W. Foley, Jr.	rwf@mbm-law.net
Lawrence H. Baumiller	lhb@mbm-law.net

To speak with any of our attorneys, call 412-242-4400.