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BOARD PRESIDENT CANNOT BE REPLACED AT THE PLEASURE OF THE SCHOOL BOARD

Montemuro v. Jim Thorpe Area School District, 2024 WL 1899031 (3d Cir. May 1, 2024) (The Third Circuit Court of Appeals concluded that a school board president cannot be removed from that office at the pleasure of the school board, but only for cause and subject to due process).

BACKGROUND

On December 4, 2019, a majority of the Board of School Directors of the Jim Thorpe Area School District elected Paul Montemuro to be President of the Board. A week later, the Board replaced Montemuro and elected a new president. Montemuro claimed that the Board did not notify him of its plan to reorganize, nor did it provide him a hearing before his ouster. He responded by suing the District and the Board members who voted against him for depriving him of his property interest in the position of Board President without due process and in violation of 42 U.S.C. § 1983 and the Fourteenth Amendment.

The school district and school directors moved to dismiss Montemuro's complaint, asserting, among other things, qualified immunity as an affirmative defense. The district court denied the motion, concluding that Montemuro had a clearly established property right in his position as Board President. The defendants then filed an interlocutory appeal to the Third Circuit Court of Appeals on the issue of qualified immunity. The Third Circuit affirmed the lower court's decision.

DISCUSSION

The Pennsylvania Constitution, in § 7 of Article VI, declares, "[a]ll civil officers shall hold their offices on the condition that they behave themselves well while in office, and shall be removed on conviction of misbehavior in office or of any infamous crime." It goes on to say that "[a]ppointed civil officers...may be removed at the pleasure of the power by which they shall have been appointed."

In a 2007 case, *Burger v. School Board of McGuffey School District*, the Pennsylvania Supreme Court recognized the superintendent of a school board as a "civil officer" under Article VI, § 7 of the Commonwealth's constitution but then determined that he was not removable at-will. 923 A.2d 1155, 1157, 1163 (Pa. 2007). The Third Circuit concluded that, as Board President, Montemuro was an "[a]ppointed civil officer" under Article VI, § 7, who was not subject to removal at-will but only to removal for cause. He thus was found to have a property interest in the Board Presidency.

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The court also concluded that Section 514 of the Public School Code likewise applied to Montemuro's appointment as Board President. That statute provides:

> The board of school directors in any school district, except as herein otherwise provided, shall, after due notice, giving the reasons therefor, and after hearing if demanded, *have the right at any time to remove any of its officers, employe[e]s, or appointees for incompetency, intemperance, neglect of duty, violation of any of the school laws of this Commonwealth, or other improper conduct.*

24 Pa. Stat. Ann. § 5-514 (emphasis added). Accordingly, the court concluded that Montemuro had a protectable property interest in his job as School Board President and, under § 5-514, could only be fired for cause after due notice and a hearing if demanded.

PRACTICAL ADVICE

The *Montemuro* decision upends what had been the prevailing understanding that school board officers served at the pleasure of the school board and could be removed without cause or the necessity of notice or a hearing. Absent a contrary interpretation of state law by the Pennsylvania appellate courts, school boards will need to adhere to the *Montemuro* ruling in order to remove their appointed officers by having cause, such as improper conduct, for their removal and providing those officers with notice and an opportunity for a hearing.

COURT REJECTS SCHOOL DEFENSE THAT "SEX STEREOTYPES" ARE NOT SEX BASED DISCRIMINATION

In Wassel v. Pennsylvania State University, 2024 U.S. Dist. LEXIS 8268 (M.D. Pa. 2024), a federal district court rejected a university defense to a Title IX action that behavior based on alleged "sex stereotyping" is different for liability purposes from sex-based discrimination.

BACKGROUND

Courts over the past several years have expanded the interpretation of what constitutes sex discrimination. In this matter, a state university faced a claim by a former band majorette that she was discriminated against under Title IX along with claims alleging a hostile education environment arising from sex-based harassment.

Kaitlyn Wassel attended Penn State from 2018 through 2022. While there, she participated in the school's majorette team as a twirler, but Wassel's experience on the team, as alleged, was troubled. On joining, majorette Coach Heather Beam ("Coach") began immediately "fat shaming" her, commenting on Wassel's weight and that other team members were properly "petite and razor-thin," and making her wear uniforms that purposely were too small. Two weeks into Wassel's first semester, she was sexually assaulted by another student. Wassell disclosed the assault to the Coach, but the Coach reacted with rage and berated Wassel as a "whore" and a "slut." Even though the Coach was a mandatory reporter, the Coach refused to take action on the assault. Throughout her time at Penn State, Wassell alleged that the Coach's harassment continued. Coach referred to Wassel in derogatory terms on an almost daily basis, telling teammates Wassel was a bad person and attempted to ostracize her from other team members, even inducing a teammate to bully her.

During Wassel's sophomore year, another majorette initiated formal discrimination complaints against Coach with the University's Office of Ethics and Compliance and the Office of Sexual Misconduct and Prevention. Following these complaints Coach warned Wassel that she had friends at the "Ethics Office" who would tell her if anybody made a complaint. Many times, Coach said that Wassel would be kicked off the team or expelled if she reported her to the University. Because of this treatment, Wassel developed an eating disorder. Her mental and physical health declined, culminating in an attempted suicide requiring a multi-day hospitalization.

During this hospitalization, Wassel's parents confronted Coach and said her conduct drove Wassel to attempt suicide. The parents insisted that the Coach report the conversation to her supervisor, the Penn State Band Director, who in turn had responsibilities to report behavior to the school's Title IX Coordinator. The parents also asked the Coach not to share Wassell's condition with her teammates. But within days Coach disclosed the medical situation to teammates and characterized Wassel as being a "faker." The Band Director advised the parents that he was aware of their conversation with the Coach and was "working on it." But instead, a series of retaliatory acts took place, including Wassell being stripped of her role as Team Captain. The Coach denied any responsibility and threatened to have Wassel expelled from school if Wassel reported her. As a result, Wassel did not report Coach's threats.

As a result of this retaliation, Wassel experienced panic attacks. Her medical treatment required her to take psychotropic medications, with such continuing to this day. During her time at Penn State, Wassel alleged she had trouble focusing on her classes, her grades suffered, she was unable to finish her classes, and had to defer grades and take summer classes. Wassel also alleged that Penn State was aware of other complaints by band twirlers based on similar behavior by Coach and the reactions of the Band Director.

One week after graduation, Wassel initiated a complaint about Coach's conduct during a meeting with the Band Director's assistant and a Penn State Human Resources representative. She received no response. Wassel then joined other majorettes who separately initiated complaints against the Coach, and they participated in an investigation by the Penn State Affirmative Action Office. Following the investigation, the Office issued a finding that Coach's behavior violated University policy. But the Office found that many cases of harassment occurred without the presence of witnesses and could not be substantiated. The report also stated that it could not discipline Coach because she had already resigned. Related to this, in March 2020, the United States Department of Education's Office of Civil Rights (OCR) issued a letter detailing the results of its investigation to the University's President. According to the OCR letter, Penn State's Title IX policies and procedures did not respond equitably to complaints of sexual harassment.

Wassel then filed a two-count complaint against Penn State for sex discrimination under Title IX, and a violation of the Equal Protection Clause under 42 U.S.C. § 1983., alleging a hostile educational environment arising from sex-based harassment. Shortly thereafter, Penn State filed a Motion to Dismiss the Complaint.

DISCUSSION

Reviewing the Motion to Dismiss, the Court focused on Penn State's primary argument was that Wassel had not alleged any harassment based on sex: Wassel's claims were based on Coach's reaction to Wassell's noncompliance with "sex stereotypes," which Penn State claimed were not actionable. Further, according to Penn State, "sex stereotypes" and sex were distinct categories. Coach's actions were not motivated by sex, and that did not deprive Wassel of educational benefits. Therefore, Penn State's response was not deliberately indifferent to give rise to a civil rights violation. The Court disagreed, holding that harassment based on non-compliance with sex stereotypes is harassment based on sex, because but for a female student's sex, a harasser cannot punish a victim's failure to comply with gender stereotypes associated with that sex.

Next, the Court found that Coach's use of "slut" and "whore" usually referred to women, and that such comments are based on more "female promiscuity than male promiscuity." Also, the Court found plausible that the Coach's weight-based harassment was motivated by Wassel's noncompliance with the stereotype on what a proper woman should look like. Coach allegedly excluded women who weighed more than others from team photographs, forced the team members to wear uniforms that were too small, and shamed them on their weight. The Court found this is plausibly connected to a sex-stereotype based view that women should be thin and short.

As to a particular denial of education benefits under Title IX, the Court held that one must consider whether the harassment had a concrete negative effect on the student's ability to receive an education. Wassel extended her schooling into summers to complete coursework, with her mental health issues culminating in a suicide attempt requiring in-patient hospitalization, all sufficient to plausibly argue a deprivation of educational benefits. The Court also held that Penn

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State had actual knowledge of the Coach's similarly discriminatory behavior toward others even before Wassell raised her claims. This knowledge legally can make an institution liable for discriminatory conduct if it responds with "deliberate indifference." In addition, the Court held Wassel sufficiently alleged that Penn State had actual knowledge of Coach's conduct of harassment even before she raised her claims. Given Penn State's alleged lack of action to this other discriminatory behavior, the Court held deliberate indifference could have taken place.

Because the Court believed Wassel plausibly alleged a Title IX hostile environment claim, she also plausibly alleged a violation of her constitutional rights under the Equal Protection Clause. The Court rejected Penn State's defense that its alleged failure to train or supervise could not be a "policy" which could impute municipal liability under civil rights violations. Instead, the Court reiterated that institutional inaction can give rise to municipal liability: it is the institution's deliberate indifference to the known risk of constitutional violations that causes such rights violations to occur, not because the training itself is unconstitutional. Because facts were sufficiently alleged in the complaint as to Penn State's failure to handle other cases involving Penn State twirlers, deliberate indifference may have occurred for purposes of this claim.

PRACTICAL ADVICE

Schools should be reminded that claims of sex-based discrimination will be interpreted broadly, and hyper-technical defenses cannot be used as a basis to defeat a claim. More important, schools should be aware of long-term demeaning incidents to students that have a relationship to "sex," such as use of language or allowing sexual stereotypes. Schools should administratively review their policies and promptly follow-up with any complaints of employees as courts are willing to take a wide definition of what constitutes "sexual harassment."

COURT HOLDS THAT SEXUAL ABUSE EXCEPTION TO IMMUNITY STATUTE APPLIES WHEN DISTRICT EMPLOYEES FAIL TO SUPERVISE CHILDREN AND A STUDENT IS SEXUALLY ASSAULTED ON A PLAYGROUND

*L.S. v. Hanover Area Sch. Dist., No. 3:22cv234, 2024 U.S. Dist. LEXIS 92252, at *28 (M.D. Pa. May 23, 2024). District Court for the Middle District of Pennsylvania holds that sexual abuse exception to the Pennsylvania Political Subdivision Tort Claims Act applied to negligence claims against a school district when supervising teachers were alleged to have failed to properly supervise children.*

BACKGROUND

L.S., a three-year old pre-kindergarten student was playing outside on the playground with her classmates. At the time, two aids were assigned to supervise the children, but L.S.'s mother asserted that they were looking at their phones instead.

L.S.'s mother then observed L.S. being chased by two boys. The boys pushed L.S. to the ground and while one of the boys sat on her back, the other boy pulled down her pants and underwear, spread her buttocks, and allegedly shoved mulch into her rectum.

Plaintiff filed multiple claims against the school district and the aids. In one count, Plaintiff alleged that the school district was vicariously liable for the negligence of the pre-kindergarten teachers who were alleged to be on their phones instead of supervising the playground during the incident. The school district claimed that it was immune from this tort claim under Pennsylvania law.

DISCUSSION

Local agencies and governments, such as school districts, are generally immune from tort liability under Pennsylvania's Political Subdivision Tort Claims Act, 42 Pa.C.S. § 8541, et seq. ("PSTCA"). Section 8542 of the PSTCA describes exceptions to that immunity under certain circumstances. Five years ago, the PSTCA was amended to include a sexual abuse exception at 42 Pa.C.S. § 8542(b)(9), which provides:

> The following acts by a local agency or any of its employees may result in the imposition of liability on a local agency:…

> (9) *Sexual abuse.* – Conduct which constitutes an offense enumerated under [42 Pa. Cons. Stat. §] 5551(7) (relating to no limitation applicable) if the injuries to the plaintiff were caused by actions or omissions of the local agency which constitute negligence.
>
> 42 Pa. Cons. Stat. § 8542(a)-(b), (b)(9).

For the sexual abuse exception of governmental immunity to apply, the victim must be under eighteen (18) years of age at the time of the alleged sexual assault.

Previously, one court determined that, when a minor plaintiff alleged that she was sexually abused by another minor student, such allegations "fit squarely within the [sexual abuse] exception[.]" *Doe by Brown v. Harrisburg Sch. Dist.*, 2020 U.S. Dist. LEXIS 142130, 2020 WL 4584372, at *5 (M.D. Pa. Aug. 10, 2020). More recently, the court construed Section 8542(b)(9) to preclude vicarious liability claims against a school district when the school district employees were not named as defendants and a high-school student/baseball player alleged he was sexually assaulted by a teammate in a hotel room while the team travelled to a national baseball tournament. *Doe v. Williamsport Area Sch. Dist.*, 2023 U.S. Dist. LEXIS 188445, 2023 WL 6929316, at *14 (M.D. Pa. Oct. 19, 2023). Another court determined that the sexual assault exception applied to negligence claims asserted against a school district and two high school wrestling coaches where the plaintiff alleged he was sodomized and experienced other instances of extreme hazing while students were left unsupervised before practice. *J.R. by & through Mr. R.R. v. Greater Latrobe Sch. Dist.*, 2:21-CV-01088-RJC, F. Supp. 3d, 2023 U.S. Dist. LEXIS 149803, 2023 WL 5510395, at *11, *16 (W.D. Pa. Aug. 25, 2023).

In *L.S.*, the court rejected the District's argument that the abuse must be committed by a school district employee for the sexual abuse exception to apply. Instead, the court held that the plain language of the statute does not specify a category of applicable persons committing that conduct or exclude certain categories of persons.

The court reasoned that a local agency employee can cause injury to a minor plaintiff through an omission where it fails to act in response to conduct constituting a sex offense. In short, a plaintiff must merely demonstrate that the local agency's alleged acts or omissions were the proximate cause of the sexual assault.

As for whether a sexual assault was sufficiently alleged, Section 5551(7) enumerates nine (9) offenses that abrogate a local agency's tort claim immunity when the victim is under eighteen (18) years of age, including involuntary deviate sexual intercourse, sexual assault, and aggravated indecent assault. 42 Pa.C.S. § 5551(7). The court concluded that allegations that one of the boys grabbed and separated L.S.'s buttocks and began shoving mulch in her rectum while another boy sat on her back sufficiently alleged sexual abuse. Moreover, the court clarified that conduct, instead of convictions, is all that is required for the statute to apply.

PRACTICAL ADVICE

Prior to the addition of the sexual abuse exception to the PSTCA, governmental liability for such injuries has existed only through federal theories which have required proof of "deliberate indifference" on the part of government officials. The new state standard of mere negligence sets a significantly lower bar. In addition, this exception provides that none of the traditional damage limitations (generally $500,000) shall apply to damage awards under the new exception for sexual abuse, 42 Pa.C.S. § 8542(b)(9). In other words, the damages for negligently causing sexual abuse (even by omission) will be determined by a jury. Accordingly, school districts must be vigilant and work with their solicitors to ensure that their employees recognize and stop sexual abuse from occurring in their education programs and activities.

SOLICITOR'S REFERENCE TO PLAINTIFF AS A "TERRORIST" WAS NOT PROTECTED BY LAWYER-CLIENT PRIVILEGE, EVEN THOUGH IT WAS MADE DURING AN EXECUTIVE SESSION CALLED FOR THE PURPOSE OF DISCUSSING SETTLEMENT OF LITIGATION

EXCHANGE 12, LLC V. PALMER TOWNSHIP, BOARD OF SUPERVISORS OF PALMER TOWNSHIP, 2024 WL 2925971 (E.D. Pa. 2024), On June 10, 2024, U.S. District Court for the Eastern District of Pennsylvania denied the

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Township's request for a protective order to prevent the Solicitor or any of the elected officials from testifying about the Solicitor's comment, even though it was made at an executive session called for the purpose of deciding whether the Township would agree to amend a settlement agreement.

BACKGROUND

Plaintiff Corporation brought a Civil Rights action in federal court against Palmer Township, alleging they made unfavorable decisions on its zoning applications because its principal and manager, Abraham Atiyeh, is of Syrian national origin. Plaintiff had applied for various zoning approvals for use of a 36-odd acre parcel, first for distribution centers and then for a trucking terminal, which applications were denied by the Board of Supervisors. During the time period the Board of Supervisors was considering the zoning requests, the Board held an executive session for purposes of consulting its Solicitor about whether the Township should amend its settlement agreement with a different corporation, which was also owned and managed by Mr. Atiyeh. During this executive session, the Solicitor, apparently referring to Mr. Atiyeh, asked "Why are we negotiating with a terrorist?" During the civil rights litigation that ensued, the Township applied to the District Court for a protective order that would bar Plaintiff's attorney from asking either the Solicitor or the elected officials about the alleged comment in order to protect lawyer-client privilege.

DISCUSSION

The Court denied the request for a protective order, concluding that attorney-client privilege did not cover the comments made by the Solicitor. The Court explained that because the attorney-client privilege obstructs truth-finding, it must be construed narrowly and on a case-by-case basis. For that reason, the privilege protects only those disclosures and comments that are necessary to obtain informed legal advice. Therefore, while the contents of the discussion at the executive session between the Solicitor and the elected officials concerning the proposed amendments to the settlement agreement were privileged, the alleged reference to the Plaintiff as a "terrorist" was not. The Court noted, "Such a comment allegedly made by the former township solicitor has absolutely nothing to do with securing or offering legal advice regarding an opinion of law or providing legal services or assistance in a pending legal proceeding." Therefore, the Court ruled Plaintiff's attorneys were free to depose the Solicitor and the public officials and to inquire about the alleged "terrorist" comment.

PRACTICAL ADVICE

The Pennsylvania Open Meeting Law permits executive sessions excluding members of the public to allow elected officials to "consult with [their] attorney…regarding information or strategy in connection with litigation." 65 Pa. C.S. §708(a)(4). The right to hold an executive session that excludes the public, however, does not insulate public officials from normal discovery procedures of litigation, such as depositions or interrogatories, concerning their discussions in executive session. A common misconception is that the right to exclude the public from a discussion constitutes a right to keep the discussion confidential under all circumstances. Even in the case of an executive session called for purposes of consulting an attorney about litigation, the right to keep the discussion confidential and prevent inquiry into the discussion is not absolute. Unless the discussion itself is protected by the lawyer-client privilege, the comments of the parties are fair game. Not only can they be asked about during discovery, but they potentially can also be introduced as evidence in a trial.

The Court demonstrated in this case that it will narrowly apply the lawyer-client privilege to protect only those comments and discussions that are strictly necessary to the parties in asking for and obtaining legal guidance. Lawyer-client privilege cannot be used as a shield against comments that are discriminatory, retaliatory, or that reflect illegal motives. Public officials and solicitors should be cautious during executive sessions to stay strictly within the bounds permitted by the Open Meeting Law and to restrict their comments and conduct to what is necessary for the purposes of the executive session. This approach is the best way to protect elected officials, including school board members, from liability.

DEPARTMENT OF JUSTICE PUBLISHES NEW ADA REGULATIONS FOR WEBSITE AND MOBILE APPLICATION ACCESSIBILITY

On April 24, 2024, the Department of Justice (DOJ) published a final rule (Rule) revising regulations under Title II of the Americans with Disabilities Act (ADA). As a general matter, Title II provides that no individual with a disability shall, because of the disability, "be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." This includes the programs and services offered by public entities through websites and mobile applications.

The new Rule articulates specific requirements to ensure that website content and mobile applications of public entities – including public school districts – are accessible to those with disabilities. Specifically, the rule explains that public entities must follow the Web Content Accessibility Guidelines (WCAG) Version 2.1, Level AA. These guidelines include requirements to ensure that those with disabilities have access to the programs, services, and learning opportunities provided by state and local governments. Content that must be accessible under the guidelines include text, images, sound, videos, and documents. For example, the Rule notes that text must be properly formatted so that it is easier to read when magnified. In addition, all videos must be properly captioned, and all images should have descriptions of content.

The Rule requires strict compliance with the WCAG standards, except in situations where nonconformance would only minimally impact the ability to access information. Although narrow, the Rule allows for certain exceptions to compliance, including if complying would result in a fundamental alteration of the website's content or impose significant and undue financial and administrative burdens on the complying entity. Other exceptions to compliance include 1) archived web content, 2) preexisting electronic documents, 3) content posted by uncontracted third parties, 4) individualized password-protected documents, and 5) preexisting social media posts.

However, web content that is subject to an exception cannot be needed to participate in a current government program. For example, if a public entity posted a document five years ago that individuals still need or must use today in order to access or participate in government services, then the exception would not apply.

The following chart shows the dates by which governmental entities must comply with the mandates of the Rule:

STATE AND LOCAL GOVERNMENT SIZE	COMPLIANCE DATE
0 to 49,999 persons	April 26, 2027
Special district governments	April 26, 2027
50,000 or more persons	April 24, 2026

A public school district is not a special district government. If a school district is a city's school district, the population of the city would be used to determine the appropriate date of compliance. Similarly, if the district is a county school district, the population of the county would be used. An independent school district would use the population estimated in the most recent Small Area Income and Poverty Estimates.

For public school districts and educators, this Rule means that all new course content that is posted online must comply with the appropriate WCAG standards. Districts should begin looking at ways to effectively comply, as the compliance procedures will take time to implement. Moreover, this is a process that could involve multiple departments and potentially entail input and guidance from numerous stakeholders, including faculty and staff, information technology employees, outside vendors, and community members with disabilities. Appropriate time should also be allotted to train faculty and staff on how to make and post content that adheres to the requirements of the new Rule.

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Tucker Arensberg's Municipal and School Law Group represents local school districts and municipalities in a variety of legal matters. Our attorneys are solicitors or special counsel for several school districts/jointures and municipalities in Western and Central Pennsylvania. In addition, our attorneys serve as special labor counsel to numerous school districts and municipalities in Western and Central Pennsylvania and have held appointments as special counsel to school boards, zoning boards, civil service commissions, and other municipal sub-entities.

The range of services called for in our representation of public bodies is quite broad. Included in that range are: public and school financing, including the issuance of bonded indebtedness; labor, employment, and personnel issues; public bidding and contracting; school construction and renovation; taxation, including real estate, earned income, and Act 511; pupil services and discipline; zoning and land use; and litigation and appellate court work. For more information, please contact us at info@tuckerlaw.com.

The Tri-State Area School Study Council at the University of Pittsburgh was established in 1948 as a continuing partnership between school districts and the University. We are the third oldest and second largest Study Council in the country. We seek to work with you to address the issues of practice we all face as we lead educational organizations to improve focus and build organizational capacity. Priorities established by the membership include: 1) timely information dissemination on current research and exemplary practices; 2) research and development technical assistance on projects to meet district needs; 3) professional development programs and workshops on current topics; 4) participation in District clinical experiences to prepare future school leaders and; 5) practitioner participation in academic preparation programs. For more information, please contact us at tristate@pitt.edu.

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