School Law for Administrators

Around the Nation ~ Wyoming

A lawsuit alleges coaches ignored bullying by a student-athlete because of his athletic abilities

Lincoln County School District (LCSD) is facing a legal battle after a group of parents claimed that school officials and coaches failed to timely discipline "one of the better" student athletes who was harassing and bullying other teammates. According to the lawsuit, coaches and officials failed to protect the school district's students and that an unnamed student, who was a victim of the particular student athlete in the fall of 2012, had his civil rights violated because of the failure to act promptly. Many parents believe that the will to win was a stronger factor than the safety of the students for the coaches involved.

The lawsuit asserts that the coaches of the Star Valley High School football and track teams failed to immediately act when they learned about the inappropriate behavior of a student athlete. The behavior included inappropriate sexual comments to other students, homophobic slurs directed at other students, unwelcome physical touching, and exposing himself to other students. The legal complaint states: Coaches "looked the other way and permitted him to continue participating in athletics, in part because he was one of the better athletes in the athletic program in the LCSD schools."

The suit contends that the student in question was not suspended because of his behavior until 2013. The lawsuit states that as a result of officials' and coaches' failure to act promptly, there were multiple victims, including the one cited in the lawsuit. The suit is seeking unspecified compensatory and punitive damages.

Source: *Casper Star Tribune*

—School Law Bulletin,
Vol. 42, No. 21, November 10, 2015, pp. 7-8.

Did You Know?

School lunch and breakfast programs now include universal meal options

The National School Lunch Program and The National School Breakfast Program both now contain a universal meal service option, the Community Eligibility Provision (CEP), which has been phased in by the Department of Agriculture over the past several years. CEP was created through the Health, Hunger-Free Kids Act of 2010, allowing high-poverty school districts and schools to offer free meals to students at no cost to the students without requiring their families to complete an annual household application.

The 2014-2015 school year was the first year that this provision was available nationwide, and according to the U.S. Department of Education, more than 14,000 schools have implemented the program, serving more than 6 million students.

Students, parents, and teachers overwhelmingly support this update to the program, and school districts and schools have noted that there is a reduction in administrative burden along with an increase in participation by needy students.

Under the program, eligible schools and districts who choose to participate receive the federal free reimbursement for up to 100% of the meals served (depending on the percentage of "identified students," i.e. those students participating in other similar poverty-based programs like Supplemental Nutrition Assistance Program or Head Start).

The Department of Education has developed, and recently updated, guidance available at **http://www.fns.usda.gov/es/node/142093** to guide school districts on implementing this provision. Best practice advice is also available.

—School Law Bulletin,
Vol. 42, No. 21, November 10, 2015, p. 3.

First Amendment

Former teacher sues after district administrators stop him from telling students about his blog

Citation: *Thomas v. New York City Dept., of Educ., 2015 WL 5143986 (S.D. N.Y. 2015)*

A federal district court in New York recently granted in part and denied in part a school district's request to dismiss First Amendment claims against it after a retired teacher was arrested for distributing information about his blog near school grounds. While the court agreed to dismiss the First Amendment complaint related to the teacher taking down his blog (which he did on the advice of his counsel), the court found it was not appropriate to dismiss the claim that school district personnel had violated his First Amendment rights by attempting to prevent him from providing information about his blog to students walking towards a school. The court also gave the retired teacher leave to amend his complaint to include a Fourth Amendment malicious prosecution complaint.

Michael P. Thomas had been a teacher employed by the New York City department of education where he taught math at the Manhattan Center for Science and Mathematics (MCSM). After he retired, Thomas started a blog in which he was critical of the school administration. In January 2013, Thomas stood on a public sidewalk that students used to approach the school and handed out his business cards that had information about his blog.

Daniel Arbetra, the school's assistant principal of security; Brian Bradley, the assistant principal of special education; and Dennis Hernandez, who was performing the duties of the school's dean of students, approached Thomas after allegedly receiving student complaints about Thomas. Though Thomas tried to move away from the three school administrators, they continued to follow him and prevent him from passing out his materials to students.

The three men got closer to Thomas and according to Thomas, were joined by another school employee who acted as if he were going to shake Thomas' hand. Thomas claims that as he went to shake the man's hand, the man threw himself on the ground, and later alleged that Thomas had physically assaulted him. The police were called and Thomas was arrested.

Thomas was charged with assault in the third degree (although the charge was later reduced to attempted assault in the third degree) and harassment in the second degree, and was placed in a holding cell pending arraignment. After his arraignment, Thomas was released on his own recognizance, but the court issued an order of protection prohibiting him from having any contact with Jimenz. Upon the advice of counsel, Thomas took down his blog.

At the trial related to the harassment and assault charges in September 2013, the school administrators testified that students had reported that a man was handing out flyers near the school and harassing students. They further testified that they had a duty to ensure the safety of students along a route frequently used by students to get to MCSM, which they called the "safe corridor." Thomas was found guilty of harassment in the second degree, but acquitted of the assault charge. As a result of the harassment conviction, the order of protection against him was continued—and expanded to prohibit him from entering the "safe corridor."

In October 2014, Thomas sued the district and school administrators, claiming that they violated his First Amendment rights by preventing him from informing students about his blog and by filing false charges against him, which led him to remove the blog from the Internet. Thomas' lawsuit also inferred a claim of malicious prosecution.

The district and administrators argued that the lawsuit should be dismissed because Thomas did not adequately allege that the administrators were acting under color of state law and because he could not bring claims that implied the invalidity of his harassment conviction. They further argued that the court should not consider the newly raised malicious prosecution claim or grant him leave to amend his compliant to add it.

Though Thomas was proceeding pro se and would be held to less stringent requirements than someone with an attorney, the court noted from the outset that he still needed to allege facts sufficient to state a claim to relief that was plausible.

The court started by addressing the First Amendment claim related to the sequence of events that led Thomas to take down his blog. The court noted that Thomas could not maintain this claim given that he voluntarily took down his blog on the advice of his attorney in the criminal proceedings against him and was not required to do so by the protection order or otherwise. Moreover, since he was convicted on the harassment claim, he could not base his First Amendment on the protection order, thus making his claim dependent on the invalidity of that conviction. Therefore this First Amendment complaint has to be dismissed.

On the second First Amendment claim related to Thomas being prevented from distributing information about his blog to students however, the court found no basis for dismissal. The administrators argued that the claim had to be dismissed because they were not acting "under color of state law," as required for them to be held liable under § 1983, i.e., they argued that when they confronted Thomas they were acting as private citizens because they "had no power or authority under state law to prevent Plaintiff from handing out his cards."

The court rejected this argument noting that when a person "uses his state authority to violate the plaintiff's rights, he may be said to act under color of state law." An important point in this consideration is that the school administrators did not need

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Around the Nation ~ Florida
Families of students who were hypnotized by principal reach settlement with district

After years of waiting, families of students who died after their high school principal hypnotized them without the proper certification will get some closure. Sarasota County School District has agreed to a settlement in the amount of $200,000 each for three families of students who died. The $600,000 payout is the conclusion of a case that began when North Point High School Principal George Kenney admitted he had hypnotized Wesley McKinley a day before the student committed suicide in April of 2011.

After Kenney made this admission, investigators learned that McKinley was not alone in being hypnotized by Kenney. In fact, they found that he had hypnotized as many as 75 students, staff members, and others between 2006 and the time of McKinley's death. Included in this group were two other students, Brittany Palumbo and Marcus Freeman who also ended up dying as a direct result of being hypnotized. Palumbo killed herself in 2011. Freeman was in a fatal car crash after apparently self-hypnotizing, a technique Kenney taught the teenager, also in 2011.

Art Hardy, the school board attorney, asserts that after the school board approved the settlement on a 4-0 vote, members were "just happy to put this behind them." According to Attorney Damian Mallard, the attorney for the families, the goal of this lawsuit was not to make money, but to hold the school district accountable and to ensure something similar does not happen again.

After this situation came to light in 2011, Kenney was placed on administrative leave. Later in 2012 he resigned from his post with the district. The case made its way to court, and he was charged with two misdemeanors in 2012, including practicing therapeutic hypnosis without a license. He entered a plea of no contest as part of a deal that saw him serve one year of probation, during which he was not allowed to practice unlicensed hypnosis. In 2013, Kenney gave up his teaching license under pressure from the Florida Department of Education was permanently barred from reapplying.

Although the culpable party is Kenney, and officially the school district had no knowledge of what he was doing, the families were not allowed to sue Kenney himself because school district employees are considered an extension of the school board under the law. For this reason, the families directed their lawsuit

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First Amendment. . . *(Continued from page 2)*

to actually have the authority to prevent Thomas from handing out his elementary cards, Thomas only needed to show that they purported to have the authority as officials of the state.

In this case, the court found that Thomas' complaint did just that. The complaint alleged that the school administrators testified at his harassment and assault trial that they approached him pursuant to their duty as school officials to maintain a so-called safe corridor for students to use to approach the school. The court found that, said another way, Thomas alleged that the school administrators "claimed to have authority, by virtue of their positions at MCSM, to prohibit Plaintiff from interacting with students at that location." That met the requirements at this stage and Thomas' complaint could not be dismissed.

On the topic of malicious prosecution, the court rejected the school administrators' argument that Thomas should not be allowed to amend his complaint because doing so would be futile. The court explained that to prevail, Thomas would need to prove: "(1) the initiation or continuation of a criminal proceeding against plaintiff; (2) termination of the proceeding in plaintiff's favor; (3) lack of probable cause for commencing the proceeding; and (4) actual malice as a motivation." While the administrators argued that Thomas could not satisfy the second prong—termination of the proceeding in his favor—because he was convicted of harassment, the court noted that the Second Circuit has recognized that "[a] plaintiff charged with crimes of varying degrees of seriousness, and convicted on the lesser charges, may nonetheless sue for malicious prosecution on the more serious claims that were terminated in his favor."

The question then was whether the assault charge was "so closely intertwined" with the harassment charge "that there is no reasonable basis to conclude that the acquittal is sufficiently distinct to support a claim of malicious prosecution." Thomas' suit did not include a malicious prosecution complaint but such a claim could be inferred and therefore the court found it appropriate to grant Thomas' leave to amend his complaint to specifically include such a claim. The court noted that Thomas could have trouble even alleging such a claim, much less proving it, but given some of Thomas' allegations including that the assault was staged, the court wanted to give Thomas the opportunity to allege the facts he believed supported this claim.

—School Law Bulletin,
Vol. 42, No. 22, November 25, 2015, pp. 3-5.

Around the Nation ~ Pennsylvania

District faces lawsuit by a football booster who was banned after allegedly recruiting players from another school district

It is unlawful for anyone to entice or recruit athletes to move from one school district to another based on their athletic abilities. After being accused by the district of doing just this, Ed Warkevicz was banned from district property. He has followed up by filing a federal civil rights lawsuit against the Berwick Area School District (BASD). BASD's board imposed the ban in June after allegations came to light that Warkevicz was involved in recruiting two brothers to play football for Berwick Area High School (BAHS) and to transfer from Nanticoke Area High School.

As a result of this situation, the Pennsylvania Interscholastic Athletic Association (PIAA) has ruled that the Beckhorn brothers are ineligible to play high school football in 2015. During a PIAA District 2 athletic committee hearing, Nanticoke Area football coach Ron Bruza testified he was told by Jules Beckhorn that Warkevicz was the alleged Berwick "coach" referenced in a Facebook post prior to the two brothers transferring to Berwick Area in April.

BASD officials assert that, Warkevicz had no official affiliation or authority in regards to the BAHS football program. BAHS football coach George Curry insisted he "never told anybody to recruit." The lawsuit claims the school district has deprived Warkevicz of his Constitutional rights of assembly, travel, speech, and association. He is seeking injunctive relief to end the ban and compensatory damages of more than $75,000. Warkevicz claims the ban has cast him in a "notoriously negative light" and has damaged his insurance business.

Source: *The Citizens' Voice*

—School Law Bulletin,
Vol. 42, No. 22, November 25, 2015, p. 8.

Cleveland Leads The Way On Social-Emotional Learning

by Rob Taylor

No one would say that Cleveland is an easy place to implement supportive and safe school environments. Poverty is rampant in its district's 96 schools, where all 40,000 students are eligible for free and reduced-price lunch. Violence has been a serious problem, as has been ongoing tensions with the police.

Cleveland is a lead member in an urban learning network called Collaborative for Academic, Social, and Emotional Learning, or CASEL, whose aim is to mix classroom curriculum with school climate promotions. Educators seek to blend social and emotional concepts into their daily instruction of traditional topics, even science. The district's commitment is to define a sequential model of social-emotional lessons for all age groups from elementary through high school.

Other urban districts participating in CASEL include Anchorage, Austin, Chicago, Nashville, Oakland, Sacramento, and Washoe County, Nevada. Perhaps Cleveland stands out because its development of its intensive social-emotional strategy was a direct response to a school shooting in 2007, displaying the district's dedication to an approach not based on increasingly severe punitive measures.

Christopher Broughton, district director of research and evaluation, voiced the philosophy: "In an urban district, we cannot control what happens outside of school. But if, inside school, students feel this is a safe haven, this is a place where they can grow and be challenged, we've done our job."

—School Law Bulletin,
Vol. 42, No. 21, November 10, 2015, p. 3.

Around the Nation ~ Florida . . . *(Continued from page 3)*

at the school district. Mallard asserts that Florida law caps damages at $200,000 unless the state enacts special legislation waving the cap. "They're not happy about" Kenney's lack of punishment, Mallard said of the students' families. "The thing that is the most disappointing to them is he never apologized, never admitted wrongdoing and is now living comfortably in retirement in North Carolina with his pension."

Source: *Seattle PI*

—School Law Bulletin,
Vol. 42, No. 22, November 25, 2015, p. 7.

2015 Sports Law Year-In-Review

(Below please find the first part of a three-part installment by Lee Green, J.D. at Baker University in Baldwin City, Kansas discussing 2015 Sports Law Year-In-Review. A special thanks to Mr. Green for allowing us to provide this information to all school administrators in Maine.)

Legal Issues in Athletics Administration

Throughout 2015, lawsuits were filed, court cases were decided, legislation was enacted, administrative agency rulings were released, state athletic association regulations were issued and other legal pronouncements were handed down impacting school sports programs. In each instance, the principles established illustrate the importance for school administrators and athletics personnel of understanding contemporary issues in sports law and proactively applying that knowledge to policy development and day-to-day management of athletics programs.

Liability for Sports Injuries

In the past 12 months, rulings were handed down in numerous cases demonstrating the need for athletics personnel to understand the legal duties imposed on them by courts related to supervision, technique instruction, warnings, safe playing environment, protective equipment, evaluation of injuries, return-to-action protocols, immediate medical response, emergency medical response planning, and safe transportation.

In June, a $50,000 settlement was agreed to in *Palestri vs. Wagner High School* (NY), a case where a high school football player suffered a broken jaw requiring two surgeries when he was attacked in an unsupervised locker room after a weight-training session. The suit, which also named as defendants the New York City Department of Education, Wagner's athletics director and several of the school's football coaches, alleged a lack of reasonable care to fulfill the duty of "general supervision"– the legal responsibility to supervise athletes for a reasonable period of time before an athletics activity (game, practice, or conditioning session) commences and for a reasonable period of time after the activity ends. The standard of practice illustrated by the case, similar to many similar lawsuits in recent years, is that unsupervised locker rooms are one of the most common athletics environs in which injuries, fights, hazing, sexual assaults, and other malfeasance occurs and related to which schools and athletics personnel are held liable to student-athletes.

In August, five high school wrestlers filed a lawsuit, *Lucia, et al vs. Rocky Point Union Free School District* (NY), seeking $12 million for Methicillin Resistant Staphylococcus Aureus (MRSA) bacterial infections contracted from a sodden wrestling mat that allegedly had not been cleaned for seven years. MRSA, resistant to treatment by most antibiotics, is a potentially lethal ailment that resulted in the Rocky Point wrestlers having to undergo multiple surgeries to remove infected tissue and endure weeks of intravenous antibiotic therapies. According to data from the Centers for Disease Control (CDC), approximately 19,000 people die from MRSA infections each year. The pleadings in the lawsuit assert negligent failure to fulfill the duties to provide a safe playing environment, to monitor athletes for injuries and incapacities, to provide adequate immediate medical assistance, and to develop an effective emergency medical response plan.

In October, summary judgment was issued in favor of a school in another MRSA case, *McWilliams vs. Newport Central Catholic High School* (KY), in which a high school football player was stricken with the infection after playing in a game on a field that had several months before been flooded with raw sewage following rainstorms that caused sewer systems to overflow. The public school district that owned and leased the field to the private school for which the plaintiff played had the field professionally cleaned after the incident by a firm specializing in sanitizing athletics environments and in its decision, the court seemed satisfied that by using a professional cleaning firm, the school had exercised reasonable care to provide a safe playing environment and protect the health and well-being of the athletes using the field.

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2015 Sports Law Year-In-Review. . . . *(Continued from page 5)*

In August, a suit was filed in the state of *Washington, Woods vs. Auburn School District*, seeking $2 million from the district and athletics personnel for life-threatening injuries to a high basketball player who crashed through wired glass doors located just a few feet beyond the baseline of the court. The victim sustained a brachial artery laceration and multiple other deep cuts on his dominant left arm. The pleadings in the case allege a violation of the duty to provide a safe playing environment through the school's failure to comply with International Building Codes and local safe building requirements banning wired glass in gymnasiums and athletics facilities. The case petition stated, "in direct violation of Washington law, federal, and state standards, and common safety practices, the Auburn School District installed and kept dangerous wired glass in the doors to the gymnasium where it was foreseeable that basketball players, traveling at high speed, could come into contact with the wired glass causing it to shatter and cause severe, debilitating and potentially life-altering injuries."

In May, a lawsuit was filed by the family of a 16-year-old basketball player against a school that leased its gymnasium to be used for an AAU tournament during which the victim collapsed and later died. The pleadings in *Cullum vs. Riverside-Brookfield Township School District 208* (IL) state that after the player fell to the floor, an emergency room physician and a nurse who separately were in attendance to watch the game came out of the crowd to render assistance. They immediately began performing CPR, and requested an Automated External Defibrillator (AED), but one was not available on-site. The suit asserts the school failed to develop and implement an emergency medical response plan for athletics events and that by failing to have an AED available, the school also failed to fulfill its duty to provide a safe playing environment and to provide adequate immediate medical assistance. The filing also alleges that the school failed to comply with an Illinois state law, the Physical Fitness Facility Medical Emergency Preparedness Act.

In July, in *Ludman vs. Davenport Assumption High School* (IA), a jury awarded $1.5 million to a former high school baseball player whose skull was fractured when he was hit by a line drive foul ball while standing in his team's dugout during a game. The injury required him to relearn how to walk and talk and left him with permanent brain injuries making him susceptible to seizures. The jury found that by erecting inadequate screening around the dugouts, the school breached its duty to provide a safe playing environment. Applying the doctrine of comparative negligence and finding that the victim was 30% at fault for not being more attentive to the possibility of foul balls being hit into the dugout, the jury cut his award to $1.05 million.

Concussions

In October, in *Pierscionek v. Illinois High School Association*, a Cook County Court granted a motion to dismiss a class action lawsuit against the IHSA seeking additional concussions policy protections for players such as the presence of medical personnel at all high school practices at all levels across the state, including varsity, junior varsity, sophomore, and freshmen teams; mandatory concussion baseline testing for all student-athletes; and a medical monitoring fund that would have paid for additional traumatic brain injury screening and treatment for former student-athletes. The court concluded that the IHSA has acted with reasonable care in developing and implementing concussion protocols by establishing policies and procedures consistent with the Illinois concussion statute and prevailing medical standards. The judge stated in his ruling, "it is clear to this court that the IHSA has acted to protect students in this state."

Also in October, a $2 million settlement was agreed to in *McNamee vs. Hillsborough County School Board* (FL), a case involving a 16-year-old, high school football player who sustained a head injury during practice while not wearing a helmet, allegedly received only a cursory evaluation by a coach and athletic trainer, and was reputedly left alone in a training room for a half-hour before being allowed to drive himself home, at which time his parents immediately transported him to a hospital emergency room where he was diagnosed with a fractured skull and a severe concussion. The lawsuit alleged negligent supervision, lack of an emergency medical response plan, inadequate immediate medical response, and failure to comply with a Florida High School Athletic Association bylaw mandating liability insurance coverage for student-athletes. The statutory limit in Florida on personal injury payouts by state agencies such as school districts is $300,000, but the school board has agreed to support the plaintiff's claims request to the Florida Legislature for authorization for the school district to pay the remaining $1.7 million of the agreed-to settlement amount. The settlement also included the implementation of a new set of concussion policies and procedures by the district, to be titled the McNamee Protocol, that are consistent with the Florida Concussion Law and prevailing medical standards for traumatic brain injuries. Furthermore, the school board will provide an additional $1 million of liability insurance coverage for every high school athlete beginning in the 2016-17 school year.

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Legal Issues In Athletics Administration. . . . *(Continued from page 6)*

In May, in *Strough v. Bedford School District* (IA), a jury awarded $990,000 to a former high school football player who was allowed to continue practicing and playing after suffering a concussion and who then suffered permanent brain damage from subsequent "Second Impact Syndrome" head injuries. The case is notable for the jury's finding of negligence against not just the district and its athletics personnel, but also against a school nurse to whom the injured player was referred, but who failed to diagnose the concussion or to refer him to a physician for a follow-up evaluation that might have identified the true extent of his head injuries, so severe that he had to eventually be placed into a medically-induced coma, undergo surgery to relieve the swelling of his brain, and remove a blood clot that had formed near his brain stem, and has left him confined to a wheelchair.

Beginning in the fall of 2015, the Florida High School Athletic Association became the first governing body in the country to mandate that all high school athletes in all sports complete a course on concussions as a prerequisite to competing for their schools. The free online course, *Concussion In Sports: What You Need To Know*, was developed by the National Federation of State High School Associations, has been required by the FHSAA for all high school coaches in the state since the course was launched by the NFHS in 2010, and has now been completed nationwide by approximately 2.3 million athletics personnel. Requiring the course of student-athletes may serve as additional evidence that a state association or school district is exercising reasonable care with regard to educating athletes about the severity and long-term implications of concussions in order to deter athletes from concealing head injuries from their coaches and athletic trainers for misguided personal or team motives.

Following the enactment of Mississippi's state concussion law in 2014, all 50 states and D.C. now have legislation mandating specific protocols for head injuries, with three tenets common to almost all of the statutes: 1) immediate removal play is required when a student-athlete exhibits indicia of having sustained a concussion; 2) same-day return to action is prohibited; and 3) return to action is permitted only after the athlete has been cleared by a licensed medical professional (the definition of which varies wildly between state laws). Other common features of state concussion legislation is a requirement that coaches complete an education program such as the NFHS course and a mandate that student-athletes and parents be provided with concussion information materials.

The free, online NFHS concussion course may be viewed **HERE** and an extensive variety of free educational resources and videos about head injuries in sports are available through the Centers for Disease Control website at *www.cdc.gov/headsup*. Administrators and coaches should be familiar with the details of their state's concussion statute; the full-text of each state law may be accessed through the National Conference of State Legislatures at*www.ncsl.org/research/military-and-veterans-affairs/traumatic-brain-injury-legislation.aspx*.