The Good, the Bad & the Ugly
A Semi-Annual Review of Judicial Decisions

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Each fall at the PAESSP Conference, we present a review of recent case law and legislation, with a focus on "the good, the bad and the ugly" – from the perspective of a school administrator. Rather than limiting this summary to once a year, we have prepared a mid-year review of judicial decisions. The complete text of the article is available on the PAESSP web site, at www.paessp.org.[1] What follows is a synopsis of that article.

The Good

- ***Students Can Grade Other Students' Papers Without Violating Privacy Rights***

  In *Owasso Independent S.D. No. 1-011 v. Falvo*,[2] a **unanimous** U.S. Supreme Court ruled that the practice of students grading one another's work does not violate the Family Educational Rights and Privacy Act ("FERPA"). As you may recall, the classroom practice in *Falvo* was students grading each other's paper according to the teacher's instructions and then returning the work to the student who prepared it. In this case, the student could either call out the score or walk to the teacher's desk. The mother objected to both the grading and system of calling out the grades as a violation of her children's privacy rights under FERPA.

  Falvo holds that student-graded papers are not "educational records" within the meaning of FERPA. Unfortunately the Court did not take the opportunity to define what are "educational records." Neither did the Court answer the question of whether FERPA provides for private lawsuits by parents against school districts or whether the only remedy against a school district that releases records improperly is a cutoff of federal money.[3]

  Justice Kennedy states, in such a circumstance, students do not "maintain the papers they grade and they were not acting on behalf of the school district." Seeing an intrusion by the federal government into the operation of the nation's schools, he commented that the appeal court's interpretation of the law would have the federal government exercising "minute control over specific teaching methods and instructional dynamics in classrooms throughout the country."

- ***Third DUI Conviction Proves Immorality***

  In *Zelno v. Lincoln Intermediate Unit 12*,[4] the Commonwealth Court upheld the School District's dismissal of a teacher on the grounds of immorality after the teacher was convicted for the third time of driving under the influence. The teacher, who taught in the District's alternative education program for students with drug/alcohol problems, was imprisoned for 92 days as a result of the conviction. Immorality is not defined in the School Code but proof of immorality generally requires the school district to establish that the conduct offends the morals of the community and that it sets a bad example for "the youth whose ideals the teacher is supposed to foster and elevate." The court held that a third conviction transformed the teacher's conduct from a single act of bad judgment to a pattern of conduct that endangers the public. Moreover, it was not necessary for the District to prove that the teacher's conduct affected her ability to teach. Her multiple convictions were ***per se*** a bad example for students which affected her credibility and her ability to teach.

This case will make it easier for a school district to dismiss a professional employee who has been convicted more than once for driving under the influence because the **per se** rule minimizes the burden of proving immorality. This is good news if you have a teacher or other staff person who drinks and drives. If, however, you are the person behind the wheel, you may want to move this decision to the "bad" column.

- ***No Deprivation of First Amendment Rights When Third Grader Not Permitted to Circulate Petition Protesting Circus***

In *Walker-Serrano v. Leonard*,[5] the U.S. District Court for the Middle District of Pennsylvania (the federal trial court that encompasses the central region of the state), addressed whether a third-grade student's passing around of a petition was protected by the First Amendment. During recess and one of her classes, the third-grader circulated a petition protesting abuse of animals at the circus and urging the school district to plan a field trip to someplace other than the circus. The student was told she could not circulate the petition because it was disruptive and it was dangerous to have pencils on the playground. At some point, the child's mother was informed of the district policy requiring approval from the principal when a student wishes to distribute materials at school. Because approval was never sought, the District did not permit the student to pass around the petition.

In its decision, the court noted that an elementary school student is not afforded the same degree of protection under the First Amendment as a high school student. Moreover, the student was permitted to express her views about animal cruelty in other ways – by speaking to her classmates and by distributing a coloring book (the latter after approval pursuant to the district policy). Therefore, the court held the prohibition on speech was not aimed at the content of the speech but rather was a time, place and manner restriction. This was a reasonable restriction due to safety concerns. Accordingly, the court found no First Amendment violation.

This case serves as a reminder that in the area of student expression (1) a school district may impose reasonable restrictions on the time, place and manner of that speech and (2) the free speech right is more or less on a sliding scale, with older students having greater rights than younger students.

- ***Gifted Students Entitled to Compensatory Education, But Court Places Limits on Appeals Panel's Choice of Remedies***

Saucon Valley S.D. v. Robert and Darlene O.[6] involved a school district appeal to Commonwealth Court from a decision of the Special Education Appeals Panel involving a gifted student, *Jason O*. The Appeals Panel, in its opinion, awarded Jason compensatory education: five semesters of accelerated and enriching coursework in mathematics and science. The court recognized that compensatory education may be awarded to gifted students. However, because this remedy was not in the **order**, the Commonwealth Court refused to address the issue. In its actual Order, the Appeals Panel ordered the district to conduct in-service training for teachers on gifted education, retain a consultant to assist in developing Jason's IEP, and place Jason in a different graduating class. In ruling on these remedies the court determined that, in the absence of statutory or regulatory delineation of the range of remedies available, the Panel was deemed to have the authority to order certain remedies for gifted students. Nonetheless, the court concluded that each of the remedies ordered exceeded the authority of the Appeals Panel.

Regarding the in-service training, the court held that if the Panel was permitted to order

education training in-service as a remedy for denial of FAPE, the consequence would be to usurp the District's authority and statutory duty under the School Code to plan and provide for professional development. The court noted, however, that while the Appeals Panel issued its ruling under the prior Chapter 14 regulations, the new Chapter 16 regulations refer to the district's statutory duty under Section 1205.1 to provide in-service training for persons responsible for gifted education. As to the participation of an outside expert on the IEP team, the court held that the Appeals Panel exceeded its authority because an expert is not a required member of the IEP under the regulations. Finally, the Appeals Panel could not ignore the school district's policy that calculated how many credits were needed to graduate based on the matriculation year by unilaterally assigning Jason to another graduation class. The court stated, "[i]t is counterintuitive to consider that student's progress was accelerated by completing fewer credits, albeit faster, than his matriculation peers."

- ***Participation in School District Sports Not Mandated for Student Attending Cyber Charter School***

Angstadt v. MIdd-West S.D.,[7] involved an effort by a 9th grade student enrolled in a cyber charter school to play on the school district's high school basketball team. The student was home-schooled from 3rd grade through the beginning of 9th grade. In October 2001, Megan's parents informed the District that she had enrolled in the Western Pennsylvania Cyber Charter School for 2001-02 and that Megan was now entitled to participate in extracurricular activities because the Charter School Law ("CSL") requires school districts to allow such participation by charter school students. The District responded that Megan could sign up for the basketball team so long as she complied with certain conditions required for students enrolled in the District including: attaining at least the 9th grade; participating in a curriculum that was similar to the District's curriculum; providing verifiable attendance documentation; providing documentation of on-going passing grades; and maintaining a citizenship grade of average or above. Because Megan was unable to comply with these conditions to the satisfaction of the District, she was not permitted to play on the basketball team.

Megan's parents then sought an injunction from the court to require the District to allow Megan to play basketball, claiming that the District was denying Megan a federally protected right. In order to obtain an injunction, the parents had to show a likelihood of success on the merits of the case and irreparable harm if the injunction was not granted. The court denied the injunction. On the first issue, the number of cases challenging cyber charter schools called into question whether cyber charter schools were actually charter schools under the CSL. In particular, the court cited H.B. 1733, a bill that calls for licensing of cyber charter schools, which states that these schools do not fit the requirements of the CSL. The court noted further that, even if cyber charter schools are valid under the CSL, it was unlikely the plaintiffs would prevail in their claim alleging a violation of Megan's rights because "there is serious question as to whether [the CSL] creates a property interest worthy of protection under the United States Constitution." The right to participate in interscholastic sports is not a federally protected right. On the issue of irreparable harm, the court held Megan would not suffer serious harm, especially because only four games remained in the basketball season. In addition, t was speculative to assume she would play in any of those games since she had not played all year.

The Bad

- ***Solicitor's Letter Denying Sabbatical Request Is an Adjudication That Must Be Appealed Within 30 Days***

In *Lehman v. Central Dauphin S.D*,[8] a school district transportation coordinator who was

injured in a motorcycle accident, requested a medical sabbatical. Following the sabbatical, he intended to use his accumulated sick and vacation time to satisfy the requirement to return to work for one year after the sabbatical. The district's solicitor sent him a letter advising that the board would not approve the request because he (the solicitor) had determined that the employee did not qualify for a sabbatical. A year and a half later, the employee filed suit in county court alleging that the denial of the sabbatical request was a violation of the School Code and a breach of contract A jury awarded him over $100,000 as compensation for half salary for one year and the difference in retirement benefits from having less time in PSERS.

On appeal to the Commonwealth Court, the district argued that the case should have been dismissed because the administrator had not appealed the adjudication of the district within 30 days as required by the Local Agency Law. An "adjudication" under the Local Agency Law is defined as "any final order, … decision … or ruling by an agency affecting personal or property rights." The employee argued that there was no "final decision" because the board never voted on his sabbatical. The court held that because the letter clearly indicated that the board did not accept the sabbatical request, it was an adjudication from which an appeal had to be taken within 30 days. Because there was no appeal for almost two years, the case should never have been heard by the trial court. Therefore, the trial court's order was reversed.

The *Lehman* decision serves as a warning that an administrator should not delay in pursuing remedies when the district takes an action that affects his or her property rights. The 30 days to appeal under the Local Agency Law does not give you a lot of time to delay. When the school board votes on a matter affecting your personal or property rights, you know that the agency (the school district) has issued a final order or decision. In situations when you are not certain whether the action is a **final** order or decision, such as a letter from the district solicitor or superintendent, you should consult with PAESSP legal counsel or your own attorney. This is done to determine whether the action should be appealed immediately to the county court or request a hearing before the board under the Local Agency Law.

The Ugly

- ***State Supreme Court Rules that Search by School Police Requires Miranda Warnings***

In the Interest of R.H.[9] is a decision that arose in the criminal context of a student's adjudication of delinquency. His defense lawyer filed a motion to suppress the statements he made during questioning by a school police officer. *R.H.* holds that the student was entitled to receive *Miranda* warnings before being questioned by the school police officer.

The facts in the case are important. The sheriff notified the East Stroudsburg Area School District Police that someone had broken into and vandalized a classroom at the high school. After entering the classroom, the school police officers discovered that someone had written graffiti on the blackboards, overturned desks and discharged the room's fire extinguisher. In addition, small sneaker footprints were observed in fire extinguisher residue on the floor and on the desktops. The school police reviewed lists of students with classes in the vandalized classroom to identify a person small in stature to match the footprints.

R.H. was suspected because of his size and discipline record of unruly behavior. He was escorted to a room by the school police where his shoes were removed for comparison with the footprints in the fire extinguisher residue, and the officer concluded that there was a match. The officer informed the student he was keeping the shoe as evidence and that he was going to question him about the break-in. The school police officer did not give *R.H.*

Miranda[10] warnings prior to the questioning nor was *R.H.* allowed to leave the room until the questioning was completed 25 minutes later. During the questioning, R.H. admitted that he was involved in the break-in. The school called the Municipal Police Department and *R.H.'s* mother.

The lead opinion from the Pennsylvania Supreme Court (two justices) assumes that *R.H.* was in custody. Remarkably, there is no distinction made between the concept of school custody and the concept of custody in a police station. The dissenting opinion goes through a lengthy analysis regarding his belief that *R.H.* was not in custody in the same way as a potential criminal defendant is in custody when held at a police station.[11]

The lead opinion explains in detail how the common pleas court appoints school police officers and that they may exercise the same powers while on school property as the municipal police, including the power to arrest, issue summary citations and detain individuals until local law enforcement is notified. Because of this, the opinion concludes that school police are more akin to police than school officials. The court also observed that school police officers were wearing uniforms and badges during *R.H.'s* interrogation. Finally, the interrogation ultimately led to charges by the Municipal Police and not punishment by school officials pursuant to school rules.

The two concurring opinions disagreed with the creation of a *per se* rule requiring *Miranda* warnings whenever a student is questioned by school police. Justice Newman would extend *Miranda* duties to all school employees (administrators and teachers) when the Constitutional interests of the students outweigh the interest of the school in solving the crime. She proposes the following factors for consideration:

1. The age of the student ("the older the student is, the more likely the information elicited from him in the interrogation will be used against him in a court of law, rendering *Miranda* warnings more necessary.");

2. The ability of the juvenile to understand the *Miranda* warnings;

3. The gravity of the offense alleged (the more serious the offense the school officials are investigating, the more likely he will be criminally charged.);

4. The prospect of criminal proceedings; and

5. The extent of the coercive environment in which the questioning occurs.

For the fifth factor, Justice Newman proposes looking at the nature of the custody, the number of questioners present, the place of the questioning and the tactics used to elicit the information sought. She would presume the need for *Miranda* warnings, but permit school officials to demonstrate that warnings are not necessary if, after balancing the factors articulated above, it was reasonable for them not to *Mirandize* the student. Particularly troubling for school administrators is that Judge Newman would attach *Miranda* warnings to all school officials, not just school police.

Justice Newman's opinion also would hold that school officials wishing to question a student for the purpose of eliciting information about an alleged crime should first inform the student's parent or guardian of their wish to question the student and allow the parent or guardian to be present during the interrogation. At the point it becomes clear to any questioner that a student may have committed serious crimes that would subject him to out-of-school criminal proceedings, Justice Newman believes the interview should cease, the parent should be contacted and the questioning should not resume until the parent is present and the student has been read his *Miranda* rights.

Justice Newman comments that in the instant case it was more likely than not that the school was going to pursue legal action rather than in-school discipline. She found the environment to be coercive where the student was escorted to the office of the school police by a school police officer and questioned by three uniformed officers for approximately 24 minutes.

Justice Saylor agreed with Justice Newman's "totality assessment" of all the factors rather than a *per se* rule. He, however, believes that such a test should be applied only to uniformed school police officers, not to school administrators.

Justice Castille in his dissenting opinion agrees with a totality test applying a rule of reason and common sense, rather than a *per se* application of *Miranda*. The dissenting opinion recites those cases that have afforded school personnel greater latitude than police with regard to *Miranda*. For example, *In Re S.K.*, 647 A.2d 952, Pa. Super. 1994, a security officer for the Pittsburgh Board of Education asked a student whether he had been smoking. The child's affirmative response led to a search of his person which revealed packets of crack cocaine. The Superior Court held that *Miranda* did not apply in this setting. *In Re D.E.M.*, 727 A.2d 570, Pa. Super. 1999, a school principal asked a student whether he possessed a gun in school. The student admitted that he had a gun in school and was ultimately charged criminally with various offenses. The Superior Court concluded there that school officials do not need to provide a student with *Miranda* warnings before questioning the student about conduct that violates the law or school rules.

Justice Castille would apply the more relaxed constitutional standard related to school searches to any Fifth Amendment violation. Unlike the lead opinion, he would not distinguish between school officials and school police. Because school police are employed by school districts with the primary duty of enforcing good order in school buildings, on school busses, and on school grounds, he believes they are more akin to other school officials and should be treated in the same way. His opinion emphasizes that school police officers are not so much law enforcement officials charged with ferreting out criminal activity, but are more specialized members of the school staff whose purpose is to assist teachers and school administrators in maintaining safety, order and discipline.

The dissenting opinion also focuses on all the cases in the past that have failed to distinguish between school police officers and other officials. The most recent case is entitled *Brian A. v. Stroudsburg Area School District*, 141 F.Supp.2d 502 (M.D. Pa. 2001). *Brian A.* involved a claim that an assistant principal and a Lieutenant in the school police at Stroudsburg High School violated the Fifth Amendment when they questioned a student regarding an alleged bomb threat without first apprising him of his *Miranda* rights. The court did not distinguish between the assistant principal and the school police officer in holding that "under the federal constitution, students facing disciplinary action in public schools are not entitled to *Miranda* warnings. Id. at 511.

What is ugly about this set of opinions for school administrators is eloquently stated in footnote 6 of Justice Castille's dissenting opinion:

In requiring a rigid application of Miranda in the fluid public school context, the lead opinion fails to account for the multitude of practical problems which its ruling likely will create. For example, it is inevitable that many students, because of their youth, lack of maturity, or lack of experience will simply not understand the Miranda warnings when given. What is a fourth-grader, for instance, to make of the Miranda litany? Also, what happens if a student actually invokes his or her right to remain silent? Can the child be punished by school authorities for doing so, e.g., segregated from the general school population, suspended or expelled, or must he or she be allowed to return to the normal scholastic routine? If the student invokes his or her right to counsel, how will this right be honored? Presumably, the child will be unable to retain an attorney on his or her own. Must the student's parents be notified so that they can retain an attorney on the child's behalf? Or will the

school maintain a list of "school attorneys" to notify in such an event to be provided most likely at taxpayer expense? What should/must be done with the child in the interim? These questions and many other practical concerns will necessarily arise following any application of Miranda to the schoolhouse, but are left unanswered by the Court's unprecedented new formulation.

In the law, an opinion is controlling only if agreed to by the majority of the justices. Here, the majority opinion would require four votes. Four of the justices agreed that school police, under these specific circumstances should *Mirandize* the student. A majority, however, did not agree on the *per se* rule. Because of the number of differing opinions, it is not entirely clear how the court would judge a search by school police made under a different set of factors. It would appear that if you add the justices in dissent to the justices in concurrence, in judging whether a student should be *Mirandized* by school police, the court would apply the assessment suggested by Judge Newman.

[1]122 S. Ct. 934 (Feb. 19, 2002).

[2]The case on that issue is scheduled to be heard on April 24, 2002 and is entitled *Gonzaga University v. Doe.*

[3]786 A.2d 1022, 38 SLIE No. 100 (Pa. Cmwlth. Ct. 2001).

[4]168 F. Supp. 2d 332, 38 SLIE No. 93 (M.D. Pa. 2001).

[5]785 A.2d 1069, 38 SLIE No. 98 (Pa. Cmwlth. Ct. 2001).

[6]182 F. Supp. 2d 435 (M.D. Pa. 2002).

[7]38 SLIE No. 99 (Pa. Cmwlth. Ct. Oct. 9, 2001) (unreported opinion), reversing 53 Pa. D&C 4th 255 (Dauphin Co. CCP 2000).

[8]2002 WL 347819 (Pa. Feb. 21, 2002).

[9]A *Miranda* warning is required when a defendant is subject to custodial interrogation. The person must be advised in clear language of his constitutional right to remain silent, of his right to a lawyer, and that what he says may be used in a later proceeding. If a person is not advised of his *Miranda* rights prior to custodial interrogation by police, evidence resulting from such interrogation cannot be used against him.

[10]In his dissenting opinion, Justice Castille objects to transferring the logic of custodial interrogation by law enforcement officers in police settings to the school setting. He states that the lead opinion ignores the special nature of the school setting and the necessity to maintain good order and to provide for the safety of the students and faculty. In his words, he dissented "from the court's importation of *Miranda* from the station house into the school house."

[11]The dissenting opinion cites U.S. Supreme Court precedent for the conclusion that restriction of action or movement is not significant enough to implicate *Miranda* rights. Instead, he believes the inquiry should be whether there is a formal arrest or restraint of the degree associated with a formal arrest. He found that R.H. was not "swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to [coercive techniques of persuasion] …."