

School Law for Administrators

Around the Nation ~ Pennsylvania

The Pennsylvania Supreme Court will hear a negligence case brought against a school district for its failure to pad the concrete gym wall

After a student was injured by hitting a wall at the end of a relay race, the school district is facing a lawsuit for failing to keep the student safe. The Pennsylvania Supreme Court will hear a negligence case against Philadelphia School District (PSD) for failing to put padding on a concrete wall in the gym. PST claims that it is entitled to immunity under the state's Political Subdivisions Tort Claims Act (PSTCA) from this suit. A Commonwealth Court previously ruled that a student has a valid claim against PSD for failing to pad a concrete gym wall.

The attorney who is representing PSD, Allison Petersen, is disappointed with the court's decision to allow a student to sue PSD, because she says that it sends an unclear message. She claims that it is a clear example of "flip-flopping." She contends that, "There have been multiple opinions over the past 20 years reaching differing conclusions, the Commonwealth Court got it wrong when it reversed itself."

Petersen asserts that under the Political Subdivisions Tort Claims Act, the district cannot be subject to lawsuits where the conduct involved, in this case, having students run a relay race using an unguarded concrete wall as the finish line, does not arise out of the care, control, or custody of real estate. Peterson alleges that the Commonwealth Court's 2016 decision allowing the case, *Brewington v. Philadelphia School District*, to go forward clearly went against precedent.

Others do not agree. Chief Justice Thomas Saylor contends that the case isn't quite as simple. In the argument session in *Brewington*, he asked pointedly, "Why is a wall not real estate?" He asserts that in his view, "The act includes the failure to act." One underlying question became the focus of this session, and that was just how broadly courts in Pennsylvania should interpret the Political Subdivisions Tort Claims Act, which provides immunity to public entities unless the injuries involve defects of real estate.

Petersen believes that the Commonwealth Court's reading was unclear because it was too broad. "The wall was acting as

intended," Petersen replied. "The court took too expansive a reading of the Tort Claims Act," Petersen said. "The teacher was not caring for the gym, the teacher was not in custody of the gym, and the teacher's instructions had nothing to do with real property." The Commonwealth Court's opinion states that *Brewington* was injured on May 9, 2012. He was nine years old when he tripped, fell, and struck his head on a concrete wall that was not protected by any matting.

Due to complications from the concussion, *Brewington* was unable to attend school for the rest of the year. *Brewington* was able to return to school the following year, but he continued to have problems with his memory and his grades dropped. A deposition in February of 2015 showed that *Brewington* continued to suffer from headaches and memory problems. Even though the trial court initially dismissed the lawsuit, the Commonwealth Court determined that the case stemmed from a "dangerous condition" due to the care, custody, and control of the property.

This case comes down to linguistics, and in order to make a judgment, the state supreme court justices pursued questions regarding the applicable scope of the act, asking if immunity applied if the kids weren't acting on a teacher's instructions, and what conduct constituted "care" of real property. Attorney Craig Falcone, who is representing *Brewington*, contended that the gym was clearly within the school's care, custody, and control, and that the padding needed to be put up because the plaintiff's injuries were a foreseeable outcome of the relay race. "We have to look at the circumstances and whether it was used for a reasonable, foreseeable purpose," Falcone said. Justice Max Baer, however, said Falcone's argument was too simple, too. "Your argument is too simple," he said. "It's not just whether it was real property."

Source: *The Legal Intelligencer*

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In the News

Teachers around the country are beginning to strike as a way to make their voices heard

Teachers in West Virginia started a trend when they went on strike and achieved the goal of getting the state governor to sign new legislation that gives teachers in the state a pay raise. Word of this strike seems to have spread like wildfire, and teachers in states all over the country are taking similar measures. Strikes

have erupted in Oklahoma, Kentucky, and Arizona teachers are on the verge of striking soon if some significant changes are not made.

Although it is spring break in most Kentucky districts,

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First Amendment

Mother claims social studies class endorsed and promoted the Islamic faith

Citation: *Hilsenrath on behalf of C.H. v. School District of the Chathams*, 2018 WL 2980392 (D.N.J. 2018)

A federal district court in New Jersey recently denied a school district's request to dismiss a lawsuit brought against it by the parent of a child who claimed that the school's curriculum violated the Establishment Clause of the first Amendment by promoting the Islamic faith. The court found that the case presented context-dependent circumstances and that the facts needed to be further established in order for the complaint to be resolved, thus making dismissal inappropriate.

C.H. was in the middle school in the Chatham School District. He was in a year long class called World Cultures and Geography. According to his mother, this class included literature with the primary purpose of promoting and advancing the Islamic religion, including two videos and a worksheet that contained materials that members of the Islamic faith use to express their religious beliefs and proselytize. C.H.'s mother included a quote from these materials which said: "May God help us all find the true faith, Islam. Ameen." C.H.'s mother alleged that the curriculum had the primary purpose of promoting and advancing the Islamic religion and that the curriculum also did not give sufficient attention to the Christian and Jewish faiths. She

sought injunctive relief primarily but also nominal damages.

In response to C.H.'s mother's complaint, the district argued that the class was a course focused on world cultures that covered many areas of the world, with students studying geography, trade, art, social, economic, and political structures, along with everyday life including religions and religious texts. Many religions are covered, according to the district, and the district argued it did not endorse or promote any of the religions, but that including materials on Islam was necessary for a comprehensive social studies curriculum. Therefore, the district motioned for the court to dismiss the lawsuit.

The court however declined to dismiss, finding that there were "factual, context-dependent issues" that could not be resolved at this early stage of litigation and that further proceedings were necessary to appropriately dissect the arguments of each party.

The court went on to detail that the Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion." The U.S. Supreme Court developed a test in *Lemon v. Kurtzman* to determine if a challenged practice violates the Establishment Clause, looking

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schools may not re-open after break if teachers' demands are not met. Thousands of teachers in Kentucky are spending their break on the picket lines in front of the state capitol, hoping to have their voices heard. Last week in Arizona, teachers last week gathered at the statehouse in Phoenix with buttons reading "I don't want to strike, but I will." In each case, teachers are pushing Republican governors and GOP-controlled legislatures to hike their pay, saying declining real wages threaten to drive staff out of the public-school system.

It is evident that educators around the country have reached the end of their rope and many of them feel that they have nothing left to give. Supporters of these strikes contend that there is a time when you need to say "enough is enough" and take a stand. Educators see leverage in tight private sector labor markets and inspiration in West Virginia, where strikers defied union leaders by holding out for a better deal. "Legislators who might have said, 'Well, why not more tax cuts and let schools take care of themselves somehow,' they're now looking around going 'I don't want this to explode in my state,'" said Lily Eskelsen Garcia, president of the National Education Association. For decades, "schoolchildren were left to pay for those big tax cuts. That chicken has now come home to roost."

This may be only the beginning, as teachers see changes being made in other states they become more adamant that changes in their own state are possible and necessary. Union leaders in Oklahoma felt the pressure building when teachers announced their plans to strike on April 2. In response, both

houses of the deep-red legislature approved tax hikes to fund a \$6,000 raise. Still, it may be too little, too late. Many teachers say that plan, the first tax increase authorized by the legislature in decades, doesn't go far enough to improve their pay, which is among the nation's very lowest. Meanwhile, legislators have already passed a separate bill repealing one of the new taxes, a levy on hotel stays.

These strikes are putting unions in a difficult position. They recognize the extreme measures that many educators are willing to go to, and they may strike even if the union has reached a deal if the deal is not extreme enough to meet their expectations. But some officials worry that prolonged strikes even if the union has reached a deal if the deal is not extreme enough to meet their expectations. But some officials worry that prolonged strikes against conservative lawmakers who've already coughed up some cash will end badly for their organizations. While Oklahoma's National Education Association affiliate is backing an indefinite walkout, the president of Oklahoma City's American Federation of Teachers local last week announced that his union accepts the \$6,000 deal as a "down payment," and warned that if the strikers stay out of work for too long, their numbers, support from school boards, and leverage could start to dissipate.

Source: *Bloomberg*

—*School Law Bulletin*,
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Broken school funding plan may lead to a lawsuit against the state

School funding in New Hampshire relies heavily on property taxes, which leads to inequities and underfunded schools. Recent budget cuts are making this problem even worse. In desperation, town and school officials are meeting to discuss possible solutions, and the idea of filing a lawsuit against the state to challenge the current method of funding public schools is high on the list. Two attorneys are spearheading this movement, Executive Councilor Andru Volinsky, and John Tobin, a lawyer who helped litigate a series of landmark state Supreme Court cases in the 1990s that established the state's responsibility to pay for an "adequate" education.

School funding is becoming increasingly dire in the state, and property-poor school districts are suffering, while other districts thrive simply because of their location. Volinsky has vowed to continue his public advocacy on the subject, and Tobin has said he plans to take the state to court if he can muster together a legal team and plaintiffs.

According to Volinsky, schools rely on local property taxes for the bulk of their funding, so school districts in areas that border a lake or host a ski mountain are able to raise large amounts of money at a very low tax rate. Meanwhile, property-poor communities raise much less money for their schools, even though they tax their residents at a much higher rate.

Tobin believes that suing the state is the place to start, but even more importantly, he wants people to be educated about how the state's education funding system works. This problem persists partly because people don't understand how the system works. Tobin said, "One of the things that's really become clear to me is that's what probably more important than a lawsuit are meetings like this. Meetings like this need to happen all

over the state. Because people don't understand the system."

The end goal of this lawsuit is stabilization. The reality is that the current school funding system in the state doesn't work, and it leads to inequities among districts and leaves many schools badly underfunded. To account for this, a \$150 million state education grant program was created to keep New Hampshire's neediest districts afloat. However, this program began to get phased out in 2016, and is being depleted by 4% each year.

In 2012, New Hampshire revamped its school funding program, according to State Rep. Werner Horn, and that is when they implemented to grant program for property poor school districts. But, this grant program was not meant as a long-term fix, rather a "Band-Aid" until a better funding program was implemented. Sadly, this has not happened, and now the grant program is being phased out leaving schools in the same place they were before.

A local school administrator, Bryan Lamirande, said that the loss of the grant program left them no choice but to take action. He claims that his district's annual stabilization grants once amounted to \$5.5 million, about a third of its total school budget. Every year since 2016, that annual allotment had been reduced by \$220,000, and their school district can no longer meet the needs of its students properly with this badly depleted budget.

Source: *Concord Monitor*

—*School Law Bulletin*,
Vol. 45, No. 14, July 25, 2018, pp. 6-7.

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to whether the action: 1) has a secular purpose; 2) neither advances nor inhibits religion; and 3) whether an excessive entanglement of the government with religion exists.

The court noted that C.H.'s mother's complaint was clearly drafted with this test in mind (stating that the curriculum had no secular purpose, has the primary purpose of advancing religion, and has entangled the school with the religion of Islam), including by endorsing and advocating Islam instead of teaching about the Islamic faith. These allegations, the court found, needed to be fully developed to determine the veracity of the statements.

Similarly, the court found that further exploration of the facts as to the district's position would be required, including as to the district's contention that videos and other material on Islam were presented to educate students on a religion rather than to advocate for Islam. However, the court pointed out that the district's request for dismissal neglected to recognize that at this stage in proceedings, the court is required to assume that the allegations made by the plaintiff are true. The district could not supplant its own allegations on a motion to dismiss.

The record needed to be more fully developed (i.e. on a summary judgment motion) and therefore the court declined the district's motion to dismiss.

The court also declined to dismiss the complaints against the defendants individually (all sued in their official capacities). The court noted that while individuals may be protected from liability under the Eleventh Amendment, local governments are not immune from suit under Section 1983 and a complaint against an individual in their official capacity could be duplicative to the complaint against their employer, this may not always be the case. For example, the court explained that where the injunctive relief ordered was a change to the curriculum, the court "doubt[ed]" that an order to the school authorities would be sufficient, instead noting that it believed the order would need to be made to the teachers and other employees in order for that injunction to sufficiently be implemented.

—*School Law Bulletin*,
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Around the Nation ~ Oklahoma

Teacher strikes around the nation making headway as Oklahoma and Arizona teachers get pay raises

The nine-day strike by Oklahoma teachers ended with a compromise. Oklahoma's largest teachers' union called for educators to return to the classroom and to shift their efforts to supporting candidates in the fall elections who favor increased education spending. The president of the Oklahoma Education Association (OEA), Alicia Priest, summed up the nine-day walkout as "a victory for teachers," despite the fact that some of their demands have not yet been met.

As a result of the strike, teachers will get a pay raise roughly \$6,000, depending on experience, and support staff will gain about \$1,250. While the strike is being viewed, overall, as a success, the biggest pieces of legislation had already been passed before the walkout, and it is disappointing that the demands for school funding were not met, concedes Priest. Priest contends that this battle will be better fought in the upcoming elections, and she is adamant that the fight is not over. School funding is simply not a priority for Republicans in the State Senate who would not even consider additional revenue sources. Priest said, "We got here by electing the wrong people to office. We have the opportunity to make our voices heard at the ballot box."

In order to fund the pay raises agreed to in the new legislation, teachers initially demanded the repeal of a capital-gains tax exemption, which applies to wealthy individuals. This demand was not met, and instead, the funding will come from additional taxes that will be paid by average Oklahomans. Additionally, the Republican-controlled Legislature partnered with Gov. Mary Fallin to institute new or higher taxes on oil and gas production, tobacco, motor fuels, and online sales as a way to fund the measures, as well as some limited new revenues for schools.

Additionally, the state has decided to allow ball and dice gambling, which will be taxed, to raise money to fund the pay raises. Brent Bushey, executive director of the Oklahoma Public School Resource Center said, "The big win happened before the walkout started, which provides administrative services for small school districts. It is a short-term win, but my focus is how do we turn this into a long-term focus on education." He agrees with Alicia Priest that in order to make some much needed, long term changes to education funding in the states, teachers will have to focus on getting some new elected officials on their side.

School funding and teacher salary deficiencies are problems that plague many states around the nation. Following the movement that began in West Virginia this year, teachers around the country are deciding to take a stand. In West Virginia, teachers successfully gained a \$2,000 pay raise. Oklahoma, Kentucky, and Arizona watched this success carefully, and

began their own protests. In Arizona, a teacher movement called #RedforEd is bringing educators together in a fight for better pay and more school funding. Teachers have put up with low pay and poorly funded schools for too long, and finally, they are beginning to say "enough is enough."

Although teachers in Oklahoma are back in the classroom, as they were persuaded to do by their union, a number of educators have begun to express displeasure on social media that the walkout was called off when there were still so many demands that were unmet. Some teachers are toying with the idea of continuing the protest on their own, with or without the support of the union. Still, the new taxes in Oklahoma represent a victory for teachers in a state that, over the last decade, has pursued some of the deepest tax and public-service cuts in the nation. It may be just a baby step in the right direction, but it is still a step, and that hasn't happened for a long time.

Following the wave of recent successes, Arizona Gov. Doug Ducey recently agreed to meet demands for pay raises for teachers. Teachers in Arizona have been protesting at the state Capitol and at schools for over a month now. Ducey proposed to boost teacher salaries 20% by 2020. The educators "were also seeking increased pay for support professionals, a permanent raise structure, and a freeze on corporate tax cuts until per-pupil spending reaches the national average." Ducey's proposal stopped short of additional spending for these things.

Ducey took this action to abate an inevitable teacher walk out if no changes were made. In the meantime, Arizona teachers staged a statewide "walk-in," demanding an increase in pay and more funding for schools overall. Additionally, teachers in Arizona, organized by a new advocacy group called Arizona Educators United, discussed the possibility of staging a walkout if Republican lawmakers refused to reinstate about a \$1 billion in cuts to state education funding over the last decade. Teacher pay raises is a good start, but there are still a number of issues that will need to be addressed to appease educators in the state.

Ducey's proposal includes a 9% increase that would go into effect this fall, bringing the median teacher salary in Arizona to \$52,725. Additionally, Ducey pledged to give teachers a 5% increase in the fiscal year 2020 budget, and another 5% in the year after that. Those increases, coupled with the 1% increase teachers were given last year, would add up to the 20% raises and make the average teacher salary \$58,130, according to Ducey.

Source: *The New York Times*

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