

## PENNSYLVANIA LEGAL UPDATE

FALL 2009 ISSUE

### STUDENT INTERNET SPEECH

A Pennsylvania high school senior and his parents successfully sued his high school when he was disciplined for creating a vulgar website. The student created a parody MySpace website that appeared to be a profile of the school principal. MySpace is a popular Internet website on which users can list their personal interests, post photographs, and share frequent updates with others. The student, working on a computer at his grandmother's home during nonschool hours, created the MySpace site so that it appeared to have been created by the principal. On the parody site, the principal recounted his own intoxication, lewd conduct, and vulgar behavior.

The student showed the website to other students during school hours on a school computer on at least one occasion. The student also accessed the site at least one other time at school, in an attempt to delete it permanently. The facts of the case were complicated by the fact that at least two other similar MySpace sites ridiculing the school principal were created by other unknown students at the same time.

During the several weeks when the websites existed, the school administration considered shutting down all classroom computers, but did not do so. On several occasions, mild disruptions resulted from students clustering at classroom computers. The investigation into the creation of the websites disrupted the schedules of the administrators, teachers, and students. Eventually, the school computer technicians managed to shut down the sites by reporting them to MySpace.

The student was suspended, banned from school activities, transferred to the district's alternative school, and excluded from graduation ceremonies. After he sued, the student and the school resolved some issues, and he was permitted to return to regular classes and to attend graduation.

In the lawsuit, a federal judge held that the school had illegally infringed on the student's free speech rights. In so finding, the judge focused on the fact that the bulk of the student's conduct, including all of his efforts to create the website, occurred off of school grounds. Pennsylvania state and federal courts repeatedly emphasize the broad authority of school officials to control conduct in schools. But because school attendance is mandatory in Pennsylvania, and schools are government-run, any school limits on students' free speech has the potential to be unconstitutional.

In drawing the line between a student's right to free speech and a school's need to maintain order and authority, courts focus on location—typically, schools may not regulate a student's conduct off of school property outside of school hours. Schools may regulate student speech during all regular school hours and on field trips, at sporting events, and at any school-sponsored event. Otherwise, student speech that occurs off of school grounds and outside of school hours can be cause for discipline only if it causes substantial disruption of school operations.

In the student's lawsuit, the federal judge decided that the mere fact that the Internet may be accessed at school does not authorize school officials to "censor" student speech online. Noting that schools must "share the supervision of children with other, equally vital institutions, such as families, churches, community organizations and the judicial system," the judge found that the student's misuse of MySpace simply did not occur at the school and did not substantially disrupt the school's operations.

This is a controversial decision and one that may not be a clear indicator of what other judges might do in the future in similar cases. It is entirely possible that a different judge might decide that a student has engaged in improper speech at school, during school hours, if a website created by the student is accessed by other students at the school.

The Internet continually broadcasts the websites, blogs, postings, and other online content that a student can legally create at home. It is possible that students could be legally disciplined, even expelled, for such speech if a rebroadcast at the school is found to be in-school speech. Furthermore, in every case, the existence of a substantial disruption at the school almost ensures that the courts will find discipline appropriate.

#### SENIOR CITIZEN'S DRIVING PRIVILEGES

An 86-year-old Pennsylvania woman recently lost her driver's license indefinitely, despite the fact that her personal physician certified that she was competent to drive.

The woman's licensing problems started when an ambulance driver witnessed her driving erratically and reported her to the local police. The ambulance driver noted that the woman crossed back and forth over the double yellow line, nearly sideswiping two cars. He also reported that she traveled several miles swerving and meandering into the wrong lane of traffic, causing oncoming motorists to take evasive action. The ambulance driver identified the woman's car and license plate number and described her physically.

Based on the report of the local police, the Pennsylvania Department of Transportation (PennDOT) sent the woman a letter advising her that she had to have a physical examination and had to file a report from her doctor that she was medically fit to drive. She did so, and her doctor

found her to be physically and mentally capable of driving. But PennDOT was apparently unsatisfied and followed up with a second written request, requiring that the woman then report for a driving exam. The woman passed the vision portion of the examination, but failed the portion on driving laws and traffic signs.

The woman appealed, arguing that once her doctor certified her as capable of driving, PennDOT had no right to demand further testing. The woman won in the county trial court but lost when PennDOT appealed the case. The Pennsylvania Commonwealth Court held that the Motor Vehicle Code gives PennDOT specific and broad powers to require one or more examinations of any driver who may not be physically or mentally qualified to drive.

The court noted that a driver's involvement in a single accident could justify PennDOT's requiring either a medical examination or further driver's testing. Because PennDOT has comprehensive authority to require medical examinations and driver's testing, any driver who receives such a request must quickly comply. Driving in Pennsylvania is a privilege, not a right, and any driver's present capacity to drive is a matter for PennDOT's determination.

## CHARTER SCHOOLS AND THE "RIGHT TO KNOW"

The Pennsylvania Legislature passed the Charter School Act 12 years ago. A charter school is a nonreligious public school that operates independently of the local school district. Charter schools are not state-regulated as are traditional schools. Instead, charter schools operate with significant freedom and autonomy.

The "charter" for each school is a contract that details the school's programs, goals, and structure. Charter schools are held accountable for academic results and fiscal management.

Their students must participate in mandatory state and federal student testing. The Charter School Act requires that individuals or groups that want to start a charter school first must apply to the local school board. If the school board rejects the charter application, the applicant may appeal to a state Charter Appeals Board in Harrisburg. Approved charter schools receive public funding, largely from the local school district. Students attend without paying any tuition. A charter school must admit students by lottery if it cannot accommodate all student applicants.

Currently, Pennsylvania's charter schools total approximately 115 and serve roughly 55,000 students. Many are cyber schools—schools whose students study from home, using the Internet to connect to teachers and educational materials. One Pennsylvania charter school, in Philadelphia, is an all-male school that focuses on traditional academic programs, with an emphasis on learning Latin. Another is the Pennsylvania Maritime Academy, which focuses on marine science and maritime business while providing a traditional academic program for 5th to 12th graders. Several Pennsylvania charter schools focus on math and science curricula. Several other charter schools are dedicated to the arts, including the performing arts.

Pennsylvania's charter schools have not been without controversy. Some have seriously underperformed, with their students falling significantly behind local public school student standards on state testing. Some have experienced financial crises, poor leadership, and high turnover in staff and students. Others have excelled and have achieved precisely the main goal of the Charter School Act: innovative public education.

The charter and financial records of charter schools are public records as a result of a recent lawsuit. A Pennsylvania man sued under the Pennsylvania Right-to-Know Act for access to the financial and contractual records of a local charter school. The school had been established by an incorporated charter group. Once the incorporated group received a charter, it signed a contract with a professional charter school management group to run the school.

The man requested annual financial statements, an auditor's report, and copies of the contracts signed by the charter group and the professional management group. Generally, the Right-to-Know Act gives citizens the broad right to have access to public records. But the charter group refused to provide any information, claiming that it was not a government agency but, instead, was a private group that qualified for government funding. The case went all the way up to the Pennsylvania Supreme Court, which decided soundly that all charter schools are public agencies for the purposes of the Right-to-Know Act. If you are interested in or concerned about a Pennsylvania charter school, you have the right of access to the school's financial and charter documents.

#### WIDOW ENTITLED TO PENSION AND WORKERS' COMPENSATION

After a Pennsylvania man died on the job, his widow and two children were awarded a monthly benefit of \$2,990. Workers' compensation death benefits are available to surviving spouses and dependents of any worker who dies in a work-related incident. The widow was also entitled to \$1,881.25 per month, as a surviving spouse, from her late husband's pension with the same employer.

Shortly after the two payments started, the employer notified the widow that it was reducing the workers' compensation benefit by the amount that the widow was receiving in pension payments. The employer claimed that it was entitled to "offset" the monthly workers' compensation payment by a portion of the pension benefits.

The widow appealed, and the court agreed with her. When an injured worker is receiving workers' compensation benefits and also becomes eligible for pension payments, employers

generally are entitled to offset the payments. But the court noted that Pennsylvania law does not have any similar offset provision for widows.

The employer argued that the widow was receiving more in combined benefits per year than her late husband would have received if he had survived. The court decided that the plain language of the workers' compensation statute creates an offset for workers but not for their surviving spouses. Until the Pennsylvania Legislature amends the Workers' Compensation Act, surviving spouses can collect both pension payments and workers' compensation benefits without any offset or reduction.

#### RISKS OF DRAG RACING

It is probably no surprise to learn that drag racing is illegal in Pennsylvania. What may be very surprising is that spectators are just as guilty as participants. It is a crime to participate in a drag race, either behind the wheel or watching from the sidelines. Any conviction for drag racing carries a fine of \$200 and can include a jail sentence of up to 90 days.

A young woman found herself convicted of drag racing and appealed, claiming that she was not guilty. She was seen by police officers assigned specifically to patrol areas frequented by drag racers. At trial, testimony was given by a police officer who had detailed knowledge of the early-morning-hour drag races. He explained that, around 3 a.m., drivers and spectators would congregate at a particular road. As many as 300 spectators would sit in a gas station parking lot and along the side of the road.

The routine adopted by the police was to enter the area suddenly, with lights flashing and siren on, to scatter the participants. On the evening of the young woman's arrest, she was sitting

in a car, with its lights out, in the gas station parking lot. When the police arrived, she quickly drove, in reverse, through the area of the gas pumps and almost struck another vehicle. The police pursued her car, stopping her a short distance from the gas station. They cited her for drag racing, fleeing from police, and reckless driving.

The young woman testified that, “stupid as it was,” she had agreed to drive with her boyfriend to the drag races. She claimed that she was frightened by the commotion when the police arrived and that she just wanted to leave. Her boyfriend had stepped out of the car, and she was left to drive away alone. The young woman claimed that she was not guilty because she was not a “participant” in a drag race.

The Pennsylvania Motor Vehicle Code prohibits drag racing and provides that no one may race on a highway or “in any manner participate in any such race.” The court upheld the young woman’s conviction, finding that the term “participate” includes participating as a spectator. The court noted that spectators “share” in drag-racing events and that their “intentional presence encourages and promotes illegal racing.”